Supreme Court, U.S.
FILED

94 400 AUG 29 1994

OFFICE OF THE CLERK
No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CATERAIR INTERNATIONAL, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GARY L. THEURER
6550 Rock Spring Drive
Bethesda, MD 20817
(301)897-7864
Counsel of Record

IVAN H. RICH, JR.
RICH & D'AMBROSIO, P.S.C.
513 South Fifth Street
Louisville, KY 40202
(502)585-6328
Counsel for Petitioner

92 pp

QUESTION PRESENTED

May the Board's rejection of an employer's good faith doubt defense to a union's presumed majority status and finding of unlawful employer solicitation requiring dismissal of a decertification election petition signed by 428 employees, none of whom claimed to have been unlawfully solicited, turn on inferential proof when in cases of unlawful pro-union solicitation the Board does not consider inferential proof or dismiss the election petition?

LIST OF PARENT COMPANIES AND SUBSIDIARIES

The parent company of petitioner, Caterair International, is Caterair Holdings Corporation. Caterair Holdings Corporation's subsidiaries (other than wholly owned subsidiaries) are Caterair Brazil S.A. (Brazil), Caterair France, S.A. (France), Caterair Airport Services, Pty. Ltd. (Australia), Barbados Flight Kitchen Limited (Barbados), Antigua Catering Services Limited, (Antigua), In-Flite Holdings (Cayman) (Cayman Islands), St. Thomas Catering Corporation (Delaware), Caterair International/Frinkost Kafer GmbH (Germany), Versair In-Flight Services Ltd. (Jamaica), Caterair International-LSG Lufthansa Services (Maryland), Comisariato de Baja California, S.A. de C.V. (Mexico), St. Lucia Catering Services Ltd. (St. Lucia) and Aeromar, Ltd., (Russia).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARENT COMPANY AND SUBSIDIARIES	ii
TABLE OF AUTHORITIES.	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Parties and Background	3
B. Board Proceedings	4
C. The Court of Appeals' Decision	5
REASONS FOR GRANTING THE PETITION	6
A. The Board's Actual Practice Effectively Eliminates the Good Faith Doubt Defense	6
B. The Board's Treatment of Unlawful Solicitation in Decertification Cases is Inconsistent with its Treatment of Unlawful Solicitation in Certification Cases	8
C. The Inference of Widespread Unlawful Solicitation in this Case is Refuted by the Record	10
CONCLUSION	15
APPENDIX	
Opinion of the Court of Appeals	1a
Decision and Order of the National Labor Relations Board	19a
Order of the Court of Appeals Denying Leave to File Petition for Rehearing Out of Time and Staying Mandate	65a
Order and Judgment of the Court of Appeals	66a

TABLE OF AUTHORITIES

Cases	Pages
Albany Steel, Inc., 309 NLRB 452 (1992), *enf'd. conditionally* 17 F.3d 564 (2d Cir. 1994)	7
Dresser Industries, Inc., 264 NLRB 1088 (1982)	8
Eastern States Optical Co., 275 NLRB 371 (1985)	8
Gaylord Bag Co., 313 NLRB No. 49, 145 LRRM 1130 (1993)	9
Johns-Manville Sales Corp. v. NLRB, 289 NLRB 358 (1988), *enf. den.* 906 F.2d 1428 (10th Cir. 1990)	7
NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990)	6,7
NLRB v. Gissel Packing Company., 395 U.S. 575 (1969)	15
NLRB v. Savair Manufacturing Co., 414 U.S. 270 (1973)	8,9
Oil Capital Electric, Inc. 308 NLRB 1149 (1992), *enf. den.* 5 F.3d 459 (10th Cir. 1993)	7
Sullivan Industries v. NLRB, 957 F.2d 890 (D.C. Cir. 1992)	7
Williams Enterprises, Inc., 312 NLRB 937 (1993)	8

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CATERAIR INTERNATIONAL, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Caterair International, by counsel, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 22 F.3d 1114. The decision and order of the National Labor Relations Board are reported at 309 NLRB 869.

JURISDICTION

The order of the Court of Appeals adopting the judgment tendered by the Board was entered on August 2, 1994. (App. 66a)[1] On July 27, 1994, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 27,

---

[1]App. refers to the Appendix of this petition.

1994. On August 2, 1994, the Court of Appeals denied both parties' motions to file their respective petitions for rehearing out of time. (App. 65a) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA) 28 U.S.C. 158(a)(1) and (5), provides:

> It shall be an unfair labor practice for an employer --
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 7 of the NLRA, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT OF THE CASE

A. Parties and Background

The Employer, Caterair International, is engaged in the business of providing food and related services to air carriers. This case involves a bargaining unit at Los Angeles International Airport employing approximately 750 employees and 57 managers. (J.A. 476-77)[2]

In February, 1991, several employees began circulating signature sheets among their co-workers seeking to decertify Teamsters Local 572. These employees testified, and it is undisputed, that the impetus for this activity was their own; management did not initiate or encourage their action. (J.A. 525-65; 595-604)

On March 4, 1991, the employees filed a decertification petition with the Board's Regional Office in Los Angeles supported by sheets containing 428 signatures. (J.A. 74-120) A copy of the petition and signature sheets was provided to the Company. There is no question of the numerical adequacy of the signatures in support of the showing of interest. (J.A. 128)

By letter dated March 15, 1991, Local 572 sought to open negotiations on the collective bargaining agreement due to expire on May 31, 1991. (J.A. 68) On March 20, the Employer responded that it had a good faith doubt with respect to the Union's majority support and declined to bargain for a new agreement pending the Union's demonstration of majority status in an election. (J.A. 69) On May 22, 1991, 318 employees attended a Union meeting and voted to strike. (J.A. 135-42) The strike began on June 3, 1991, with approximately 200 employees not reporting to work. At no point did the number of employees on strike exceed 289, or approximately 38% of the bargaining unit. (J.A. 476-77) It is also undisputed that the sole reason for the strike was the Company's refusal to bargain for a new agreement. (J.A. 143-44; 159-60)

The Employer continued operations during the strike with nonstrikers and replacement workers.

---

[2]J.A. refers to the Joint Appendix filed with the Court of Appeals.

B. Board Proceedings

On March 11, 1991, Local 572 filed an unfair labor practice charge, the first in a series, claiming management involvement in the solicitation of signatures for the decertification petition. (J.A. 2) On September 30, 1991, almost four months into the strike, after dismissing several earlier charges, the Region issued a complaint alleging that management solicitation tainted the showing of interest in support of the decertification petition. The withdrawal of recognition was therefore alleged to be unlawful and the strike an unfair labor practice strike. (J.A. 7-20)

Three days later the Union made its unconditional offer to return to work. (J.A. 71) The Company responded the following day, declining to displace any current employee and stating that the strikers would be placed on a recall list to be notified as openings occurred. (J.A. 72)

At the hearing before the ALJ 28 employee witnesses testified for the General Counsel. Most were admitted Union supporters who struck in June. Seven strikers testified essentially that they had been asked or encouraged by a total of four managers to sign in support of the decertification petition. All seven testified they declined to sign the petition. Not one of the seven identified the signature sheets submitted in support of the decertification petition as the paper they were asked to sign, although two specifically stated that the sheets submitted in evidence were not those they were asked to sign. (J.A. 192-96; 228-32) There was no testimony that a single one of the 428 employees who signed the petition did so pursuant to management solicitation or encouragement.

One of the seven witnesses testified to a mild threat -- that she was told if the Union stayed it would charge her back dues, presumably since she had not joined in spite of the existence of the Union security clause. (J.A. 329) Another employee testified he was told that by signing the employees could obtain better benefits. (J.A. 347)

There was no other testimony of direct solicitation, threats or promises by managers in connection with the decertification petition. However, several employees testified about instances where they saw management soliciting other employees. (*See* pp. 11-14 *infra*)

The four managers all testified, denying either soliciting employees to sign the decertification petition or making any threats or promises.

Providing no reasoning or analysis for his credibility determinations with respect to what were essentially one-on-one encounters, the ALJ resolved the conflicting testimony in favor of the General Counsel's witnesses in all significant respects. In essence, the ALJ simply announced that he credited each employee's version and did not credit the testimony of the managers. (App. 49-54a)

The ALJ further concluded that management approached "numerous" employees and he "presumed" this activity influenced those who actually signed the decertification petition. (App. 55-56a)

Additionally, the ALJ found the decertification petition showing of interest was tainted, the withdrawal of recognition unlawful and the strike an unfair labor practice strike. (App. 56a)

The ALJ's recommended Order contained both cease and desist and affirmative bargaining language and was affirmed by the Board without comment. (App. 59-61a)

C. The Court of Appeals' Decision

The Court of Appeals accepted without substantive analysis the ALJ's opinion, adopted by the Board, and found "inescapable" the infrerence that management solicited a "considerable number of signatures." (App. 12-13a) However, the Court remanded for explanation the Board's "affirmative" bargaining order which would have prevented the employees from petitioning for another decertification election for at least a year. (App.18a)

REASONS FOR GRANTING THE PETITION

This Court has never considered the Board's "good faith doubt" rule in cases of employer withdrawal of recognition from a union. In practice, the Board's application of this rule requires an employer to show an actual union loss of majority. In making this showing, the employer risks being caught violating the Board's other rules prohibiting unlawful solicitation and interrogation. Even a minor violation of these rules by an employer results in rejection of its "good faith doubt" defense and dismissal of any decertification election petition that may have been filed. Moreover, as in this case, any strike in protest of the withdrawal of recognition will be held to be an unfair labor practice strike, subjecting the employer to a crushing backpay liability.

As currently administered by the Board, the "good faith doubt" defense is illusory and requires an employer to violate the law. This Court should require the Board either to apply the good faith doubt rule realistically or announce its elimination.

In opposing this petition, the Board will be unable to cite a single case -- not one -- in which there was any unlawful employer anti-union solicitiation, no matter how minor, where the employees were ever permitted to vote on whether to retain the union.

A. The Board's Actual Practice Effectively Eliminates the Good Faith Doubt Defense

An employer supposedly may withdraw recognition from an incumbent union if it establishes by "objective evidence" that a majority of employees no longer supports the union. *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 788 n.8 (1990) Withdrawal of recognition may be justified by either (1) a numerical showing the union in fact lacks majority status or (2) circumstantial evidence sufficient to support a good faith doubt of majority status. *Id.* at 788

Both before and after *Curtin Matheson*, however, the Board's practice has been to ignore these rules. The Board regularly rejects circumstantial evidence of the union's lack of employee support as insufficient.[3] It "essentially require[s] proof of express anti-union statements by each individual worker comprising a majority of the bargaining unit...effectively collapsing [the good faith doubt rule] into the proof in fact rule." *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428, 1432 (10th Cir. 1990) The catch is an employer will most probably violate the Board's rules against unlawful interrogation if it tries to make the required showing of lack of majority in fact.

This fundamental inconsistency concerned both Chief Justice Rehnquist and Justice Blackmun, writing separately in *Curtin Matheson*. The Board's rule requiring an employer to meet the same good faith doubt standard for withdrawal of recognition before polling employees about their desire for continued union representation "bar[s] the employer from using what might be the only effective means of determining those [employee] sentiments." 494 U.S. at 797 (Rehnquist, C.J. concurring) *See, also* 494 U.S. at 799, n.3 (Blackmun, J. dissenting)

Virtually the only proof the Board has been unable to dismiss as insufficient is "[a] petition signed by a majority of employees in which they indicate that they do not wish to be represented by the union." *Sullivan Industries v. NLRB*, 957 F.2d 890, 898 (D.C. Cir. 1992) The mere filing of a decertification petition, how-

---

[3]*See*, e.g. *Johns-Manville Sales Corp.*, 289 NLRB 358 (1988), *enf. den.* 906 F.2d 1428 (10th Cir. 1990) (267 replacement workers in 590 member bargaining unit, strike violence and threats aimed at replacements, demand that replacements be discharged to make room for strikers and decertification petition signed by 211 employees, all insufficient); *Oil Capital Electric, Inc.*, 308 NLRB 1149 (1992), *enf. den.* 5 F.3d 459 (10th Cir. 1993) (striking workers all replaced at time of withdrawal of recognition; union did not have shop stewards or process grievances and was unable to obtain enough authorization cards to file election petition, all insufficient); *Albany Steel, Inc.*, 309 NLRB 442 (1992), *enf'd.* on condition that Board conduct election 17 F.3d 564 (2d Cir. 1994) (no employees paying dues, no grievances filed, no current contract, general expression of employee dissatisfaction, all insufficient).

ever, is not sufficient grounds for withdrawal of recognition unless it also shows a union loss of majority support. An employer may decline to bargain only if it is "presented with a valid decertification petition supported by a majority of employees." *Dresser Industries, Inc.*, 264 NLRB 1088, 1089 n.7 (1982)

The Board's further requirement in decertification cases is that the petition must be "presented" to the employer with no involvement on its part beyond "ministerial aid". *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) As a practical matter, most decertification petitions are "blocked", at least for a time, by union unfair labor practice charges alleging unlawful employer assistance.

The net result is virtually any employer involvement in a decertification effort results in dismissal of the petition because the unlawful conduct is held to have caused the union's loss of majority support.

A recent case illustrating the extent to which the Board will stretch this bias is its decision on remand from the D.C. Circuit in *Williams Enterprises, Inc.*, 312 NLRB 937 (1993) In *Williams*, a statement by the manager of a successor employer to a group of employees that it "intended to operate the... [acquired] plant as a non-union plant" was inferred to be sufficient, standing alone, to cause the employees to file a decertification petition four months later. *Id.* 312 NLRB at 939.

B. The Board's Treatment of Unlawful Solicitation in Decertification Cases is Inconsistent with its Treatment of Unlawful Solicitation in Certification Cases

It is interesting to contrast the Board's treatment of unlawful anti-union solicitation in decertification cases with its treatment of unlawful pro-union solicitation in certification election cases.

In *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973) this Court declared that the Act's election processes were "wholly neutral" and the Board "may not sanction procedures that cast their

weight for the choice of the union and against a non-union shop or for a non-union shop and against the union." *Id.*, 414 U.S. at 278, 280 Accordingly, the Court ruled against the Board and found coercive a union's promise to waive initiation fees for those employees who signed for the union before an election.

As demonstrated above, the Board's practice in cases of unlawful employer solicitation in decertification cases is to infer that the conduct influenced a sufficient number of signatures to negate any claim of lack of majority status and dismiss the petition. In cases of *Savair* violations, however, the Board does not indulge in any inference of coercion, will invalidate only those particular signatures where there is showing of unlawful solicitation and, rather than dismiss the petition, permit an election.

In *Gaylord Bag Co.*, 313 NLRB No. 49, 145 LRRM 1130 (1993) the Board recently considered a union's unlawful fee waiver for five employees in a unit of 62. There was no consideration given to the collateral coercive effect of the union's conduct. The Board merely observed that the five (or possibly seven) unlawfully solicited cards were not numerically sufficient to affect the union's showing of interest in support of its petition. 145 LRRM at 1132 The Board further refused to dismiss the union's election petition but strongly suggested it would dismiss an employer-tainted decertification petition because such a petition "abused the Board's electoral processes." 145 LRRM at 1132 n.5

In *Gaylord Bag* the Board observed that the employee signatures constituting a showing of interest are merely used to determine whether there is sufficient reason to expend government funds to conduct an election. The employees' desire for representation "is determined by the election, not by the showing of interest." 145 LRRM at 1132 Precisely so. Then why does any unlawful employer solicitation result in dismissal of the decertification petition, thereby depriving employees of even one opportunity to vote a union <u>out</u>, when correspondingly unlawful union violations do not result in dismissal of the election petition and employees are given another chance to vote a union <u>in</u>? This is hardly a "wholly neutral" election rule as required by *Savair*.

C. The Inference of Widespread Unlawful Solicitation in this Case is Refuted by the Record

It was the preceding sort of result oriented analysis to which the Employer was subjected in the instant case. It is undisputed that the Employer was not involved in the employees' decision to seek decertification nor did any of the 428 employees who signed for decertification claim they were solicited by management. The sole evidence of management solicitation was the testimony of seven admittedly pro-union employees who, although they did not sign the petition, claimed they were solicited by management in essentially one-on-one encounters.

In addition, one of these employees testified he witnessed the solicitation of another employee by a manager, bringing to eight the total instances of solicitation. Each of the eight employees declined to sign and none claimed any retaliation as a result. The only testimony of a management threat or promise during the time of the solicitation was one employee's being told the Union would charge her back dues, and another being told that by signing the employees could obtain better benefits.

There was no other finding of unlawful Employer conduct in connection with the decertification petition. Neither the Board nor Court of Appeals found that this conduct was sufficient to taint the decertification petition. Therefore, the finding of taint must rest on the testimony of the employees who testified they observed management soliciting other employees.

The substance of this testimony was merely that they saw managers talking with employees. The Board's inference, accepted by the Court of Appeals, is that management was unlawfully soliciting other employees in every instance when they were later seen talking to them. This crucial inference is directly refuted by the record.

None of the witnesses actually identified the decertification petition as being carried by any manager, accurately identified the employees being solicited or, with one exception, heard what the manager was saying.

The critical language of the Court's analysis (App. 12-13a) is quoted; then the record evidence refuting it is discussed.

"Caterair concedes that several witnesses observed managers talking with groups of employees during this period."

There was no such concession by Caterair. Only four managers out of 57 were alleged to have engaged in unlawful solicitation: Castillo, Pacheco, Peralta and Monroy. (J.A. 25, 45) Of these, only one -- Monroy -- was accused of talking to groups of employees. The testimony concerning Monroy by employees, Sosa, Davalos, Mercado, Silva and Lara is discussed, below.

"[Sosa, Lopez, Davalos and Mercado] testified that they saw managers talking with employees while holding sheets of paper."

Only two managers, Peralta and Monroy, were accused of carrying a paper for employees to sign. None of these four witnesses identified the petition in evidence as the paper they were asked to sign. Further, none of the four identified the paper they saw with Peralta or Monroy as the petition.

Sosa merely saw Monroy "talking to a group of employees." (J.A. 352, 360) He admittedly did not see the paper, did not know if it was the same paper as the one Monroy had earlier shown him and could not hear what was being said nor could he identify the employees. (J.A. 352)

Lopez testified that manager Peralta asked both him and Hernandez to sign the petition. (J.A. 203-5, 207-9) These instances of solicitation were among the eight conceded by Caterair. Lopez specifically admitted that Peralta did not have any paper when talking to Hernandez. (J.A. 214) There was no testimony that Peralta ever talked to a group of employees.

Davalos testified she saw Monroy talking to employees holding the "same sheet" a co-worker had asked her to sign. (J.A. 173) At the hearing, Davalos specifically denied that the petition in evidence was the paper she was asked to sign. (J.A. 195-97) As

the ALJ observed, "there are no signatures which were submitted in support of the decertification petition of the nature Ms. Davalos talked about." (J.A. 196) Davalos admittedly could not hear what Monroy was saying, could not identify the employees and did not see anyone sign. (J.A. 178-79)

Mercado testified only that he saw Monroy "talking to three other employees." (J.A. 370) Mercado did not claim that Monroy was holding any paper and admitted that he could not hear what Monroy was saying. (J.A. 370-72)

In sum, only two of these four witnesses claimed to have seen any sheets of paper. These two could not identify the paper as the petition. Three of the four could not hear what the manager was saying and the fourth (Lopez' testimony about Monroy's solicitation of Hernandez) was one of the eight instances of solicitation conceded by Caterair at the outset.

"Sosa, Lopez, Davalos and Mercado had actually been solicited by managers themselves."

This observation is puzzling. It is hard to see how the solicitation by management of these four witnesses enhances their testimony about instances when they supposedly observed solicitation of others. Either they saw and heard something, or they did not. As shown above, with the exception of Lopez' testimony about the solicitation of Hernandez, these employees did not see or hear anything probative.

"Manager Monroy ... was seen by Lara ... Davalos ... Sosa ... Silva ... and Mercado" talking to groups of employees while "holding a pen and clipboard".

As the Court of Appeals observed earlier in its opinion, Monroy testified he often carried around a clipboard and asked employees to sign work related documents. (App. at 9, J.A. 506-19, 608-23) This testimony was corroborated by employee Montufar. (J.A. 502-503) The mere fact that Monroy was talking to employees simply cannot be the basis for presuming he was in-

volved in unlawful solicitation. As shown above, none of these employees identified Monroy as carrying the petition in these instances nor could they hear what he was talking about.

"Lara saw four employees sign Monroy's paper."

This assertion in the Court's opinion is squarely refuted by the record. Lara could not have seen any such thing. He testified to two incidents of supposed solicitation.

In the first incident he supposedly saw three employees sign a paper Monroy was holding. Lara admitted he was 75 feet away from Monroy, could not hear what was being said, did not actually see the paper, merely "assumed" it was for decertification and could not identify any of the employees. (J.A. 239-41, 244)

In the second incident, Monroy supposedly solicited five employees in the cold food department. Lara identified three, Sanchez, Phipps and Montufar. (J.A. 242) Each of these three employees testified that neither Monroy nor any other manager asked them to sign the petition. (J.A. 489, 495, 502) This testimony was not even considered by the ALJ. Although Lara stated he saw Phipps sign Monroy's paper, Phipps testified she signed pursuant to solicitation by a fellow employee, not Monroy. (J.A. 495)

Therefore, in the first incident, Lara admittedly did not see or hear anything from 75 feet away and could not identify the employees who supposedly signed. In the second incident, the employee whom Lara claimed he saw sign specifically contradicted his claim.

"Davalos saw Monroy hand an employee his pen."

As discussed above, Davalos could not hear what Monroy was saying nor could she identify the petition. (JA. 179) That Monroy handed an employee a pen is, by itself, not probative.

"Employee[s] Davalos, Lopez and Vasquez ... told people about management's activities. Most of the testifying employees had heard of management's efforts through co-workers."

There is no evidence any of the employees Davalos and Lopez talked to ever signed the petition. Vasquez specifically testified he did not tell any of his co-workers about his being solicited by Monroy. (J.A. 259, 264-65) There is nothing in the record to support the Court's assertion that "most" of the testifying employees had heard of management's efforts from co-workers. And there is no evidence any of these co-workers signed the petition.

"Our conclusion stands without regard to Myrna Silva's testimony ... overhear[ing] Monroy talking to ten employees about signing the decertification petition."

Silva admitted she could not identify any of the employees being solicited and claimed Monroy was making notes on the paper. Silva did not identify the signature sheets in evidence as being like those carried by Monroy and it is undisputed that none of the sheets submitted in support of the petition contained such notes. (J.A. 76-120) The Court engages in some puzzling speculation that notes can be erased or constitute printed names of employees. There is no evidence, however, that any names were forged or erasures made. Since the Court apparently does not rely on Silva's testimony to any substantial degree, there is no need to examine this point further.

CONCLUSION

As this Court recognized in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), an election is "the most satisfactory -- indeed the preferred -- method of ascertaining whether a union has majority support." *Id.* at 601 the Court expressly did not decide whether an employer can commit an unfair labor practice and still obtain an election. *Id.* at 601 n.18 Under the guise of its remedial discretion, the Board now prevents all offending employers from obtaining an election while permitting multiple elections to unions that engage in equally coercive conduct.

Does collective bargaining stability require that employees be forever bound, and probably pay dues, to a union they really do not want? The Board refuses either to announce the elimination of the good faith doubt defense or give it a realistic interpretation. This Court should provide definitive guidance.

Respectfully submitted,

Gary L. Theurer
6550 Rock Spring Drive
Bethesda, MD 20817
(301) 897-7864
Counsel of Record

Ivan H. Rich, Jr.
RICH & D'AMBROSIO, P.S.C.
513 South Fifth Street
Louisville, KY 40202
(502) 585-6328
Counsel for Petitioner,
Caterair International

August 29, 1994

Appendix

BEST AVAILABLE COPY

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 5, 1994 Decided April 29, 1994

No. 93-1008

CATERAIR INTERNATIONAL,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Petition for Review of an Order of the
National Labor Relations Board

Ivan H. Rich, Jr., argued the cause for petitioner. With him on the brief were *Thomas K. Wotring* and *Dean C. Berry*.

Frederick C. Havard, Supervisory Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Frederick L. Cornnell*, Attorney, National Labor Relations Board, *Linda Sher*, Acting Associate General Counsel, National Labor Relations Board, and

---

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Aileen A. Armstrong, Deputy Associate General Counsel, National Labor Relations Board.

Before WALD, EDWARDS, and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: Caterair International ("Caterair"), a company that furnishes meals and related services to the airlines, seeks review of an order of the National Labor Relations Board ("NLRB" or "Board") finding that the company committed unfair labor practices against Chauffeurs, Sales Drivers, Warehousemen & Helpers, Local 572, International Brotherhood of Teamsters, AFL–CIO ("Union"). Adopting the findings of the Administrative Law Judge ("ALJ"), the Board concluded that Caterair had impermissibly influenced the signing of a decertification petition and relied upon that tainted petition to refuse to recognize the Union in violation of §§ 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. § 158. The Board issued an order requiring Caterair to cease and desist from all unfair labor practices and compelling Caterair to bargain with the Union. Caterair contends that the record lacks sufficient evidence to support the Board's conclusions and that the Board failed adequately to explain its affirmative bargaining order. We affirm the Board's substantive conclusions and enforce the Board's order insofar as it requires Caterair to cease committing unfair labor practices. Because we agree that the Board did not provide the requisite explanation for its bargaining order, however, we remand as to that portion of the remedy so that the Board may supplement its decision.

I. BACKGROUND

A. *Factual Context*

Caterair has provided food services for many of the nation's commercial airlines since it took over the operations of Marriott In-Flite Services in December 1989. Since September 1988, employees at three of Caterair's present facilities in California have been represented in a single unit by Chauf-

feurs, Sales Drivers, Warehousemen & Helpers, Local 572, International Brotherhood of Teamsters, AFL–CIO. In 1989, the Union and Marriott In-Flite Services negotiated a contract that was effective from June 1, 1989 until May 31, 1991. Among other provisions, the contract contained a union security clause requiring that union dues and fees be deducted from the paychecks of employees who authorized such deductions. Caterair succeeded to the entire contract and recognized the Union when it assumed Marriott's operations.

By February 1991, Caterair employed roughly 750 unit employees and fifty-seven managers at the three facilities. Approximately 450 of those employees and thirty-nine managers worked at the largest of those three facilities ("Facility A"). Caterair employed about 275 unit employees and fourteen managers at the second facility ("Facility B"). The smallest facility employed only twenty-five unit employees and four managers ("Facility C"). As of February 1991, 403 unionized employees, or 54% of the unit, had authorized Caterair to deduct union dues and fees from their paychecks.

In December 1990 and January 1991, three employees asked Caterair's human resources director how to decertify the Union. The company prepared fliers responsive to their inquiries describing the process by which employees could request their fellow employees to sign a decertification petition expressing disaffection with the Union and requesting that the Board hold an election. These fliers stated that the petition had to be filed with the Board between sixty and ninety days prior to the expiration of the contract, a period that would run between March 2 and March 31, 1991. They also indicated that the petition had to be signed by at least 30% of the unit employees. One document explained that if more than 50% of employees signed the petition, Caterair could lawfully refuse to negotiate with the Union. The human resources director provided these informational sheets to the three inquiring employees and made them available to others upon request.

On or around February 22, 1991, employee Xiomara Menendez and others prepared a decertification petition stating

that signers "d[id] not want the Union" to represent them any longer. During a one-week period beginning February 22, Menendez and about eight other employees solicited signatures at Facility A. Employee Bonnie Metcalf and three other employees simultaneously sought signatures at Facility B.

The evidence, as credited by the ALJ,[1] suggests that on or around February 22, several managers at both facilities began actively to solicit employees' signatures. Caterair's transportation manager at Facility A, Jose Castillo, called employee Luz Davalos at her desk to inquire whether she had "signed the paper to get rid of the Union." Transcript (Tr.) of February 4, 1992 Hearing (Testimony of Luz Davalos), at 72. When Davalos replied that she did not know what Castillo was referring to, Castillo said he would "send somebody else later to talk to" her. *Id.* Thirty minutes later, employee Dolores Vasquez visited Davalos at her desk and asked her to "sign the paper to get rid of the Union" and told her "not to be a dummy." *Id.* Davalos refused to sign. Manager Castillo approached Davalos in the cafeteria two hours later, asking her whether someone had come by to talk to her already. She responded affirmatively and reiterated that she would not sign anything. Davalos told three other employees about her encounter with Manager Castillo. *See id.* at 79.

During the same week, the production manager at Facility A, Alberto Pacheco, approached employee Rosa Rayas at her work area and inquired whether she had signed the petition "to get the Union out." Tr. of February 6, 1992 Hearing (Testimony of Rosa Rayas), at 401. When she said no,

---

[1] Caterair does not contest the ALJ's decision to credit the testimony of seven employees that their signatures were solicited by management. Caterair also concedes that one employee, Israel Lopez, witnessed the solicitation of another employee, Hernandez. Caterair does, however, challenge the inferences drawn from the ALJ on the basis of testimony by several employees that they witnessed managers talking to groups of employees and asking them to sign documents. This challenge addresses the conclusions the ALJ drew from witnesses' testimony, rather than the credibility of the testimony itself.

Manager Pacheco told her that if she did not sign, the Union would charge her "more than $200" in back dues. *Id.* at 404. He stated that the "Union was no good" because "the Union actually was a Mafia." *Id.* at 405. Pacheco also told her that her signature was necessary because "they only needed a few more signatures to finish the amount of signatures that the Government requires to get the Union out." *Id.* Rayas refused to sign.

On February 21 or 22, employee Carlos Sosa saw the sanitation manager at Facility A, Saul Monroy, talking to employees while holding a sheet of paper. Shortly thereafter, Monroy approached Sosa and asked him to sign a petition containing about nine signatures so that employees could "obtain better salaries, cheaper health program, and more days' vacation." Tr. of February 6, 1992 Hearing (Testimony of Carlos Sosa), at 422. Sosa was not able to get a good look at the petition, because Monroy had obscured the top of the page. Sosa refused to sign.

Manager Monroy solicited employee Jose Vasquez sometime between February 22 and 24 at the entrance to the dishwashing department. Monroy carried a clipboard and asked Vasquez to "sign the list." Tr. of February 4, 1992 Hearing (Testimony of Jose M. Vasquez), at 191. After Vasquez asked what the list was for, Monroy responded "that he was taking the signatures so that the Union will stay *in*." *Id.* (emphasis added). Vasquez testified that everyone at the company knew he was pro-Union. He stated that he had been forewarned by fellow employees that this was merely a maneuver on Monroy's part to get him to sign the decertification petition to *oust* the Union. Vasquez did not sign.

On or around February 26, Manager Monroy brought a clipboard to employee Alfred Mercado at his work area in the dishwashing department and asked him to sign a piece of paper. Monroy refused to tell Mercado what the piece of paper was for, although Mercado assumed it was the decertification petition that he had heard talk of around the workplace. *See* Tr. of February 6, 1992 Hearing (Testimony of Alfred Mercado), at 447. Mercado refused to sign.

Manager Monroy approached employee Victor Saldana in late February in the dishroom. He showed Saldana a clipboard on which he was collecting signatures, but obscured the actual petition under a white sheet of paper. Monroy asked Saldana if he would "sign to be able to get the Union out." Tr. of February 7, 1992 Hearing (Testimony of Victor Saldana), at 512. Monroy told Saldana that signing would be "good" for him, and asked him "Why do you have to pay $15 per month and when they fire you, you're not going to get any help?" *Id.* Saldana refused to sign and testified that he later told six or seven employees about the exchange.

On February 26, the assistant manager at Facility B, Oscar Peralta, spoke with employee Israel Lopez in the cafeteria in the presence of employee Teresa Reveco and six or seven others. Peralta handed Lopez "a petition to get the Union out" and asked him to sign it. Tr. of February 4, 1992 Hearing (Testimony of Israel Lopez), at 108. Lopez observed a paper that was approximately three-fourths full of signatures.[2] Explaining to Peralta that he was a Union Shop Steward, Lopez refused to sign. Lopez later witnessed Peralta soliciting the signature of employee Hector Hernandez. *See id.* at 112. Lopez heard Hernandez refuse to sign. Lopez told as many as twenty employees about his exchange with Manager Peralta.

Although Caterair vigorously disputes the conclusions of the ALJ drawn from such evidence, contending that the

---

[2] During the hearing before the ALJ, both Israel Lopez and Luz Davalos exhibited some confusion in describing the papers they were asked to sign. Lopez maintained that the paper he saw was white and unlined and that it bore Bonnie Metcalf's signature. The page of the petition submitted to the Board that bore Metcalf's signature, however, was lined. Davalos testified that Dolores Vasquez had held both a white sheet of paper and a yellow legal pad. Although Vasquez never showed the petition to Davalos, Davalos had the impression that the petition was on yellow paper. None of the forty-eight sheets comprising the completed petition was yellow. Significantly, Caterair does not now challenge the ALJ's decision to credit the testimony of Lopez and Davalos that they were personally solicited by management.

evidence does not sustain the ALJ's inference that managers solicited any actual signatures on the petition, the ALJ also credited the testimony of several employees that they saw managers talking to groups of employees and handing them sheets of paper to sign during this period. On February 22, employee Jose Lara saw Manager Monroy talking to ten employees while holding a piece of paper. Lara saw three employees sign the paper while Monroy held it for them. Later that day, Lara saw Monroy talking to about five other employees, and he witnessed another employee signing the paper. *See* Tr. of February 4, 1992 Hearing (Testimony of Jose Lara), at 178–80. Employee Davalos reported seeing Monroy talking to three or four employees in the cafeteria on February 23, after she had been solicited by Manager Castillo. Monroy was holding a piece of paper and offering the employees his pen. *See id.* (Testimony of Luz Davalos), at 77. Employee Myrna Silva saw Monroy talking to a group of about ten or eleven employees on February 25. He was holding a piece of paper nearly half-filled with signatures, on which he appeared to be making notes. Silva heard Monroy ask the employees "to sign the paper to get the Union out because the Union was stealing from [them]." Tr. of February 7, 1992 Hearing (Testimony of Myrna Silva), at 536. Employee Mercado, who had himself been solicited by Monroy, also saw Monroy later talking to several other employees. *See* Tr. of February 6, 1992 Hearing (Testimony of Alfred Mercado), at 445.

By March 4, 1991, the decertification petition contained 428 employee signatures, representing 57% of the bargaining unit. Several employees filed the petition with the Board on that day so as to begin the process of official decertification. In a March 15 letter, the Union asked Caterair to bargain for a new contract. Caterair responded by letter of March 20 that it had a "good faith doubt" about the Union's majority status, citing the decertification petition supported by a majority of employees. Caterair refused to begin negotiations with the Union on a new contract.

After several employees discussed the possibility of striking over Caterair's refusal to bargain, the general manager of

Facility A, Jose Ramirez, called employee Daniel Godoy into his office in early April. Ramirez told Godoy that he knew Godoy had been "agitating" among the employees in an effort to initiate a strike. Ramirez told Godoy that his actions were illegal and that he could be fired. *See* Tr. of February 5, 1992 Hearing (Testimony of Daniel Godoy), at 315. On May 22, the Union held an employee meeting at which the employees voted by written ballot to go on strike in response to Caterair's refusal to negotiate. The margin in favor of a strike was 318 to 6, that is, 42% of the total unit voted in favor of striking.

According to further testimony credited by the ALJ, management attempts to dissuade strikers continued. In late May, human resources director Millie Bisono told employee Jerry Hayes that he would be fired if he joined the strike. *See* Tr. of February 5, 1992 Hearing (Testimony of Jerry Hayes), at 282. On May 31, labor relations director Roberto Velazquez had a conversation with employee Fulgencio Plascencia in which Velazquez stated that Caterair "did not want the Union" and that all striking employees would be "automatically fired." Tr. of February 6, 1992 Hearing (Testimony of Fulgencio Plascencia), at 353. Velazquez told employee Castulo Flores the same thing the next day. *See* Tr. of February 6, 1992 Hearing (Testimony of Castulo Flores), at 378. On June 3, Manager Castillo told employee Willie Land that if she intended to strike, she would be out of a job. *See* Tr. of February 7, 1992 Hearing (Testimony of Willie E. Land), at 502.

The strike began on June 3, 1991 and involved 289 striking employees, or 39% of the unit. Sixty-one of the striking employees had previously signed the decertification petition. Caterair began hiring permanent replacements for the strikers almost immediately. Caterair unilaterally granted a wage increase of 4–6% to employees on August 31, 1991, during the pendency of the strike.

The Union ended the strike in early October and made an unconditional offer by letter of October 3, 1991 to have the strikers return to work. The letter called the strike an unfair

labor practice strike and asked the company to dismiss replacement employees and reinstate the striking workforce. Caterair refused to reinstate any of the strikers and denied that the strike had been motivated by Caterair's unfair labor practices.

B. *Board Proceedings*

The Union filed its initial unfair labor practice charge on March 11, 1991, alleging management solicitation of signatures for the decertification petition and management coercion of signatures in violation of §§ 8(a)(1) and (3) of the National Labor Relations Act. The Union supplemented this charge with an allegation that Caterair had violated § 8(a)(5) by refusing to bargain. The Board dismissed this latter charge on June 27, 1991 on the grounds that Caterair had relied upon the decertification petition in formulating its belief that the Union did not command majority support. However, the Board reversed itself with respect to this dismissal on September 30, 1991, issuing a multi-count complaint alleging that management solicitation had impermissibly tainted the decertification petition, thus invalidating Caterair's reliance, and that the resulting strike was motivated by Caterair's unfair labor practices.

The hearing before the ALJ took place in February 1992. Twenty-eight employees testified on behalf of the Union, the majority of them relating either that managers had solicited their signatures or that they had witnessed managers talking to groups of employees and asking them to sign papers. None of the testifying employees had actually signed the petition. Four managers testified, denying that they had solicited employee signatures for the petition. At least one manager testified that he often carried around a clipboard and asked employees to sign work-related documents.

The ALJ credited the employee-witnesses' testimony and discredited the conflicting managers' testimony, concluding that the managers had engaged in "widespread and conspicuous" solicitation of employees' signatures in violation of § 8(a)(3) of the National Labor Relations Act. The ALJ

noted that Caterair's managers had on a few occasions promised benefits or made mild threats to employees in an effort to procure their signatures, in violation of § 8(a)(1) of the Act. Considering all of the circumstances, the ALJ concluded that Caterair's unlawful solicitation had tainted the entire petition. Acknowledging testimony of the employee rumor mill, the ALJ reasoned that even those employees who had not personally been solicited by management had presumably been aware of and influenced by management's full-scale efforts. Accordingly, the ALJ determined that Caterair had violated § 8(a)(5) of the Act by relying upon the tainted decertification petition as the basis for withdrawing recognition of and refusing to bargain with the Union. The ALJ also concluded that the strike was motivated by Caterair's unfair labor practices, a conclusion Caterair does not now challenge.

After finding these violations, the ALJ proceeded to the remedial inquiry, ordering Caterair to cease and desist from interfering with its employees' rights under § 7 of the National Labor Relations Act to form, join, or assist labor organizations of their own choosing. The ALJ also ordered Caterair to reinstate strikers to their former jobs and to provide backpay from the date of the Union's unconditional offer to return to work, October 3, 1991. Finally, the ALJ ordered Caterair to recognize and bargain with the Union upon its request as the collective bargaining representative of employees in the unit.

On December 15, 1992, the Board adopted the ALJ's substantive conclusions and remedial suggestions. The Board made only a minor technical modification, adding to the remedial order the requirement that Caterair preserve its payroll and personnel records to facilitate the determination of backpay. Caterair filed this timely petition for review.

II. Analysis

A. *Standard of Review*

The standard of review governing this case is by now familiar. We must uphold the Board's factual findings if they

are supported by substantial evidence. *See* 29 U.S.C. § 160(f) ("the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall ... be conclusive"); *Sullivan Indus. v. NLRB*, 957 F.2d 890, 894 (D.C. Cir. 1992); *Williams Enterprises v. NLRB*, 956 F.2d 1226, 1232 (D.C. Cir. 1992); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 912 (1992); *St. Agnes Medical Ctr. v. NLRB*, 871 F.2d 137, 144 (D.C. Cir. 1989). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). We owe substantial deference to inferences drawn from these facts. *See Avecor*, 931 F.2d at 928; *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 42 (D.C. Cir. 1980). Additionally, we must accept the ALJ's credibility determinations, as they are adopted by the Board, unless they are patently without basis in the record. *See NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1297 (D.C. Cir. 1988).

We must also give great deference to the NLRB's selection of remedy. *See Avecor*, 931 F.2d at 928 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969)). We have given consistent credence to the fact that "the Board draws on a fund of knowledge and expertise all its own." *Gissel Packing*, 395 U.S. at 612 n.32; *Sullivan Indus.*, 957 F.2d at 894. Our essential task as a reviewing court is to assure ourselves that the Board "has considered the factors which are relevant to its choice of remedy, selected a course which is remedial rather than punitive, and chosen a remedy which can fairly be said to effectuate the purposes of the Act." *Peoples Gas*, 629 F.2d at 42.

B. *Substantial Evidence*

Caterair's primary contention on review is that the evidence fails to sustain the ALJ's conclusion that management's efforts actually influenced any of the 428 employees who signed the decertification petition. Caterair asks us to deem dispositive the fact that none of the 428 employees who

actually signed the petition testified to having been solicited by management. Caterair concedes, for purposes of this appeal, that managers solicited the signatures of employees Davalos, Lopez, Rayas, Jose Vasquez, Sosa, Mercado, Saldana, and Hernandez. Caterair also concedes that several witnesses observed managers talking to groups of employees during this period, sometimes during the lunch hour and sometimes at work, often asking employees to sign pieces of paper. However, Caterair contends that, with one exception, none of the witnesses to manager-employee conversations overheard the substance of these exchanges or observed the contents of the managers' papers. Caterair urges that the testimony of Myrna Silva, who did overhear Monroy talking to ten employees about signing the decertification petition, be discounted in determining causation. Silva testified that she saw Monroy making "notes" on his paper. Not one of the forty-eight pages of the petition, according to Caterair, contains margin notes.

Caterair's challenge cannot prevail. The inference drawn by the ALJ, that managers talking to groups of employees in the cafeteria and at various work sites during this one-week period were attempting to solicit signatures for the petition, is neither fanciful nor weak. Several of the witnesses who testified that they saw managers talking with employees while holding sheets of paper—Sosa, Lopez, Davalos, and Mercado—had actually been solicited by managers themselves. Manager Monroy, who solicited testifying employees Sosa, Jose Vasquez, Mercado, and Saldana, was seen by Lara talking to fifteen employees; by Davalos talking to three or four employees; by Sosa talking to "groups of four or five persons at a time"; by Silva talking to ten or eleven employees; and by Mercado talking to three employees during the one-week period. Lara, Davalos, and Silva all saw Monroy holding a pen and a clipboard. Lara saw four employees sign Monroy's paper. Davalos saw Monroy hand an employee his pen. Giving this circumstantial evidence its due, and giving appropriate deference to the ALJ's credibility determinations, we find the inference that Caterair's management solicited a

considerable number of signatures not only far from weak, but virtually inescapable.

Moreover, as the ALJ observed, employees who signed the petition at the behest of other employees were undoubtedly aware of management's obvious efforts to engineer the decertification. According to their own testimony, employee Davalos told three people about management's activities; Lopez told twenty; Jose Vasquez told four. Most of the testifying employees had heard of management efforts through coworkers. Employee Davalos' testimony also suggests that at least one *employee* who sought signatures was working under the auspices of Manager Castillo. We find no cause to quibble with the ALJ's conclusion, adopted by the Board, that signing employees were influenced by pervasive management efforts to procure signatures.

Our conclusion stands without regard to Myrna Silva's testimony, so it matters not at all that she testified she saw Monroy making "notes" on his clipboard, while none of the submitted pages of the petition bore margin notes. But in any case the mere fact that Silva saw Monroy write *something* on the clipboard does not in our view fatally undermine her testimony. "Notes" may be erased or may be on sheets of paper other than the petition itself.[3] "Notes" may also constitute the printed names of employees, rather than margin doodles. In other words, we do not ascribe to this testimony the significance Caterair suggests, and we do not see this evidence "fairly detract[ing]" from the weight of testimony suggesting pervasive management intervention. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Finally, despite Caterair's argument to the contrary, we do not view this as an instance in which employees' "brewing discontent with the Union" is or was immediately evident, so as to substantiate the conclusion that the decertification petition genuinely reflected an anti-Union animus on the part of employees. *Cf. Hotel, Motel & Restaurant Employees*

[3] Several employees testified that managers obscured the petition by cover sheets. It is by no means clear, then, that Monroy made notes on the actual petition.

Union Local No. 19 v. NLRB, 785 F.2d 796, 800 (9th Cir. 1986) (employee discontent made connection between employer's conduct and loss of support weak). A majority of workers in the unit continued to have union dues deducted from their paychecks in February 1991. Caterair makes much of the fact that only 39% of unit employees participated in the strike. However, given substantial evidence in the record that Caterair actively engaged in the intimidation of potential strikers, we cannot ascribe great weight to this point. It is noteworthy, on the other hand, that while the petition itself commanded majority support by only fifty-three signatures, sixty-one of the workers who had signed the petition later participated in the strike. If the sixty-one striking employees were subtracted from the number of employees originally signing the petition, the resulting number of signatures would represent *less* than majority support. On balance, we think it plain that employees did not demonstrate sufficient hostility to the Union to override the substantial weight of other evidence indicating pervasive management influence over the decertification petition.

C. *The Board's Bargaining Order*

Caterair's second argument has significantly more merit. Caterair contends that the Board erred in imposing an affirmative bargaining order without (1) demonstrating that it gave appropriate consideration to employees' rights under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, to select their own bargaining representative, or (2) explaining why other remedies were inadequate. With nary a word of explanation, the Board adopted the ALJ's recommendation and imposed not only a cease and desist order requiring Caterair to discontinue unfair labor practices, including "failing and refusing to bargain with the Union," but also an affirmative bargaining order compelling Caterair to "recognize and bargain, upon request, with the Union as the collective bargaining representative of its employees."

Although it might to the layman seem like lawyerly overkill to require Caterair simultaneously to cease refusing to bar-

gain *and* to bargain upon request, the cease and desist and affirmative bargaining orders have very different legal and practical consequences. We have previously recognized that an affirmative bargaining order is an "extreme remedy," because according to time-honored Board practice it comes accompanied by a decertification bar that prevents employees from challenging the Union's majority status for at least "a reasonable period." *Sullivan Indus. v. NLRB*, 957 F.2d 890, 903 (D.C. Cir. 1992); *Williams Enterprises v. NLRB*, 956 F.2d 1226, 1237 (D.C. Cir. 1992).[4] The statute does not mandate that a decertification bar accompany a bargaining order, and the Supreme Court has neither required nor disclaimed its use. Nor do we. However, the Board has long followed the practice of distinguishing between affirmative bargaining orders on the one hand and remedial cease and desist orders that have the effect of compelling bargaining on the other, requiring a decertification bar for a reasonable period of time in the former, but not the latter, context.[5] *See, e.g., Masada Communications, Ltd.*, 293 N.L.R.B. 931, 933 (1989) (Cracraft, concurring).

Despite its employee-protective effects in certain circumstances, for example in safeguarding a fragile union against the lingering effects of massive employer coercion, a decertification bar, whatever its duration, also prevents employees from exercising their right to dislodge the union however their sentiments about it may change. Decertification bars thus touch at the very heart of employees' rights under the National Labor Relations Act, and may have the effect of squelching, albeit temporarily, the right of employees "to

---

[4] The cease and desist order, in stark contrast, merely requires an employer to "conform his conduct to the norms set out in the Act.... No further penalty results." *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 740 (1961).

[5] In *Sullivan Indus.*, 957 F.2d at 903 n.5, this court invited the NLRB to clarify its position on remand if it did not in fact attach these consequences to the two different orders. The NLRB did not urge a contrary position in this case, and appears for all intents and purposes to continue its practice of imposing decertification bars of "reasonable" length when it issues bargaining orders.

form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. Because "effectuating ascertainable employee free choice [is] as important a goal as deterring employer misbehavior," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), we have consistently required some indication from the Board that it has engaged in that "balancing which is an essential component of any valid exercise of discretion" of employee rights against union protection before imposing an affirmative bargaining order. *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 45 (D.C. Cir. 1980); *see also Sullivan Indus.*, 957 F.2d at 904; *Williams Enterprises*, 956 F.2d at 1237; *Avecor, Inc. v. NLRB*, 931 F.2d 924, 937–38 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 912 (1992); *St. Agnes Medical Ctr. v. NLRB*, 871 F.2d 137, 147–48 (D.C. Cir. 1989).

It is perhaps useful to note that the Board has employed affirmative bargaining orders and their concomitant decertification bars in two very different contexts. The first is exemplified by *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), in which nonincumbent unions claimed representative status on the basis of their possession of authorization cards from a majority of employees, and the employers refused recognition. The Supreme Court, in upholding the Board's finding that the employers' actions constituted unfair labor practices, recognized the existence of two different remedies in the Board's arsenal: directing an election, or, if the employer's illegal conduct had so diminished the union's strength as to make an election inherently unfair, ordering the employer to bargain with the union for a reasonable time. *See id.* at 612.

The case before us involves the second situation in which the Board has resorted to affirmative bargaining orders. Here, the employer wrongfully refused to bargain with an *incumbent* union. Unlike the aspirant unions in *Gissel*, an incumbent union has an established base and enjoys a rebuttable presumption of continued majority status, which subsumes the continued right to bargain. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987); *Sullivan*

Indus., 957 F.2d at 897.[6] Thus, in the incumbent union context, but not in the *Gissel* context, there is a sound third option in addition to the two remedies recognized in *Gissel*: mandating return to the status quo, under which the employer refuses to bargain only at the peril of inviting an unfair labor practice charge. The cease and desist order issued by the Board in this case is a prime example of this third option. As is utterly clear, under the cease and desist order, *Caterair is required to bargain with the Union.* The *only* critical difference between the cease and desist order issued in this case, which we affirm, and the bargaining order, which we remand, is that under the cease and desist order, employees remain free to petition for decertification.[7]

Because the Board availed itself of what appears to be a more than satisfactory remedy in this case, the cease and desist order compelling Caterair to recognize and bargain with the Union, we must insist that the Board affirmatively demonstrate its consideration of the competing values at stake before imposing the additional sanction of a bargaining order. As we observed in *Avecor*, "a bargaining order is not a snake-oil cure for whatever ails the workplace; it is an 'extreme remedy' that must be applied with commensurate care." 931 F.2d at 938–39 (citation omitted). Five times in the past fourteen years this court has remanded such orders to the Board with a request for explanation as to why, in the particular circumstances, the extra protection against decerti-

---

[6] During the first year after a union is certified by the Board, it is usually entitled to a conclusive presumption of majority status. *See Fall River Dyeing*, 482 U.S. at 37.

[7] Of course, even under a cease and desist order employees would be subject to the contract bar rule, under which an effective collective bargaining agreement acts as a bar to decertification unless the petition for decertification is filed more than sixty and less than ninety days before the expiration of the agreement. *See, e.g., Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 868 n.10 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981); *Dalewood Rehabilitation Hosp., Inc. v. NLRB*, 566 F.2d 77, 79 n.2 (9th Cir. 1977). In the absence of a collective bargaining agreement, the contract bar rule does not apply.

fication was necessary. This case makes it an even half-dozen. We must assume the Board will deign to provide the necessary explanation at some point in order to obtain enforcement. We persist not out of pique but from a sense that it is our duty to ensure that the Board adheres to its statutory mandate. Once more we cannot fulfill this task on the meager record the Board has seen fit to put before us.

III. Conclusion

For the foregoing reasons, we affirm the substantive conclusions of the Board and enforce the Board's remedial order to the extent that it requires Caterair to cease and desist from committing unfair labor practices. We are unable, however, to evaluate the Board's affirmative bargaining order without the benefit of an explanation of why the Board thought it necessary. Accordingly, we remand on that score.

Enforced in part and remanded in part.

309 NLRB No. 141

SDR
D-3341
Los Angeles and
Long Beach, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CATERAIR INTERNATIONAL

and

	Cases 31-CA-18702
CHAUFFEURS, SALES DRIVERS,	31-CA-18900
WAREHOUSEMEN & HELPERS, LOCAL 572,	31-CA-18919
INTERNATIONAL BROTHERHOOD OF	31-CA-18958
TEAMSTERS, AFL-CIO[1]	31-CA-19133

DECISION AND ORDER

The issues presented for Board review in this case[2] are whether the judge correctly found that the Respondent violated Section 8(a)(1) of the Act by efforts to decertify the Union, violated Section 8(a)(5) by refusing to bargain, withdrawing recognition from the Union, and unilaterally granting a wage increase, and violated Section 8(a)(3) by failing to reinstate unfair labor practice strikers. The Board has considered the decision and the record in

---

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] On August 26, 1992, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The respondent filed exceptions and a supporting brief. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Caterair International, Los Angeles and Long Beach, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

Dated, Washington, D.C. December 15, 1992

James M. Stephens, Chairman

Dennis M. Devaney, Member

John N. Raudabaugh, Member

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderence of all relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

JD(SF)--111--92

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

CATERAIR INTERNATIONAL,

Cases 31—CA—18702
31—CA—18900
and 31—CA—18919
31—CA—18958
31—CA—19133

CHAUFFEURS, SALES DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 572, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

Salvadore Sanders, Atty., Los Angeles, CA,
for the General Counsel.
Ivan H. Rich and Teresa Shannon, Attys.,
of Rich, Adams & D'Ambrosia, P.S.C.,
Louisville, Kentucky, for the Respondent.
Ralph M. Phillips, Atty., of Wohlner
Kaplan, Phillips, Vogel & Young,
Encino, CA, for the Union.

DECISION

Statement of the Case

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing in this matter was held before me in Los Angeles, California, on February 4-7, and 25-26, 1992. The Charges were filed by Chauffeurs, Sales Drivers, Warehousemen & Helpers, Lo-

cal 572, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (herein called the Union), on various dates between March 11 and November 13, 1991. Thereafter, the Regional Director for Region 31 of the National Labor Relations Board (herein called the Board) issued various Complaints and Amended Complaints, and the final Consolidated Complaint was issued on December 20, 1991. The Complaint and Notice of Hearing alleges violations by Caterair International (herein called the Respondent) of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (herein called the Act). The Respondent's answer to the Complaint, duly filed, denies the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel and counsel for the Respondent. [1]

Upon the entire record,[2] and based upon my observation of the witnesses and consideration of the General Counsel's brief, I make the following:

---

[1] The Respondent's Motion to File Brief Untimely is hereby denied. The reasons advanced in support of the Respondent's motion, namely, out-of-state litigation in an unrelated proceeding involving work stoppages and numerous unforeseen hearings in both state and federal court, is insufficient to excuse its failure to timely submit a motion for an extension of time to file briefs in this proceeding.

[2] The General Counsel's unopposed motion to correct the transcript is hereby granted.

Findings of Fact

I. Jurisdiction

The Respondent is a Delaware corporation engaged in the business of catering food for commercial airlines, with its corporate offices located in Potomac, Maryland. It maintains offices and three facilities in Los Angeles, California (the facilities involved herein). In the course and conduct of its California business operations the Respondent annually purchases and receives goods and services valued in excess of $50,000 directly from suppliers located outside the State of California.

It is admitted, and I find, that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted, and I find, that the above-named Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Issues

The principle issues raised by the pleadings are whether the Respondent solicited employees to sign a decertification petition, and whether the extent of the Respondent's involvement with the decertification petition is sufficient to warrant a finding that it violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union; and whether the strike which began on June 3, 1991, was an unfair labor practice strike.

B. The Facts

1. Background

In 1989 the Respondent became the successor employer to Marriott InFlite Services, a division of Marriott Corporation. The Respondent currently maintains facilities in the United States and Canada. It employs some 3000 employees in its Western Region, which includes the Los Angeles facilities involved herein.

The labor relations and bargaining history between the Union and Marriott is as follows: The Union was certified as the collective bargaining representative of Marriott's employees on March 18, 1977. Apparently no collective bargaining agreement was entered into, and following another representation election the Transport Worker's Union was certified as the employees' collective bargaining representative on November 9, 1979. On April 15, 1983, following another election, the Transport Worker's Union was decertified. The Union herein was again certified as the employee's collective bargaining representative on September 4, 1988, and thereafter, on about June 1, 1989, a collective bargaining agreement containing a union security clause was negotiated and entered into. An election to withdraw the authority of Marriott and the Union to enter into a union security agreement (Withdrawal of Union Shop Authority) was held on October 23, 1989, and the employees voted to retain the contractual union security provision.

The Respondent, during times material herein, employed 750 employees at its three facilities in the Los Angeles area. Upon becoming a successor employer to Marriott, it continued to honor the existing collective bargaining agreement between Marriott and the Union, which agreement was effective by its terms from June 1, 1989, through May 31, 1991, [3] and which covered the employees at the three Los Angeles facilities in a single bargaining unit.

---

3 All dates or time periods hereinafter are within 1991 unless otherwise specified.

The bargaining unit specifically includes "kitchen supervisors." The Respondent has 57 managers, and managers are the first line "supervisors" within the meaning of Section 2(11) of the Act. During February, when the decertification petition was circulated, infra, were 39 managers and approximately 450 employees at the 607 Facility, 14 managers and approximately 250 to 300 employees at the 308 Facility, and 4 managers and approximately 25 employees at the 380 Facility. The 607 Facility and the 308 Facility are located near the Los Angeles International Airport. The much smaller 380 Facility is located in Long Beach.

On March 4, employees filed a decertification petition in Case 31—RD—1224, supported by the signatures of 428 of the 750 unit employees, the great majority of whom are Spanish speaking. The petition consists of 45 pages; each page contains from about one to forty-five signatures. The heading at the top of most pages of the petition states, in both Spanish and English, "We do not want the Union. We want an election." Other pages of the petition contain the heading, in both Spanish and English, "We the following employees of Caterair Shoppes 607, 308 and 380 do not want the Teamsters Local 572 to represent us anymore." It appears from the dates opposite each signature on the petition, that it was circulated during a one-week period, between February 22 and 27.

On March 15, the Union notified the Respondent of its intent to reopen the collective bargaining agreement for negotiation. The Respondent replied by letter dated March 20, that it declined to bargain for a new agreement, explaining that it had a good faith doubt of the Union's majority support as evidenced by the decertification petition signed by a majority of the unit employees.

As noted above, the agreement expired on May 31. The Union commenced a strike against the Respondent on June 3. Of the 750 bargaining unit employees, some 289 employees, or 38 percent of the bargaining unit, participated in the strike.

It is alleged herein that the strike was an unfair labor practice strike in protest of the Respondent's alleged solicitation of signatures on the decertification petition and other threats and unlawful acts. By letter dated October 31, the Union advised the Respondent that it had elected to end the strike. It made an unconditional

offer on behalf of the striking employees to return to work, demanding that the "temporary replacement workers" be discharged and the "regular employees, who were unfair labor practice strikers" be returned to work immediately. The Respondent replied by letter dated October 4, denying that the strike was an unfair labor practice strike and stating that, "Your requested procedure for reinstatement of strikers is denied. No current employee will be removed to make room for a striker." Moreover, the Respondent advised the Union that it had established a recall list for strikers who were requesting reinstatement, and that the employees would be notified as openings occurred in their former or substantially equivalent jobs.

2. Employee recollection of
notices posted by the Respondent

Jose Ordonez has been employed since June 23, 1981. He testified that after May 15, he saw notices posted on the wall at the entrance to the Respondent's cafeteria at Facility 607. The notices were handwritten, and said that the strike was illegal, and that any employee who participated in the strike would be terminated. The notices were posted for approximately two weeks.

On cross-examination it was pointed out that Ordonez' affidavit stated that the notice was "printed" and that "the strike would be illegal and that if the employees went on strike, they had enough replacements, and we would be terminated." The notice was not signed. According to Ordonez, there were no notices that said strikers would be arrested.

Jesus Hernandez has been employed since January 30, 1977. On June 2, at Facility 607, he saw General Manager Jose Ramirez post a typewritten notice on the wall near the ladies room, next to where the payroll checks are handed out to employees. The notice said, according to the testimony of Hernandez, "We know that tomorrow all of the employees are going on strike. Every person going on this will be permanently replaced." This notice was in both Spanish and English. About a week prior to this occasion, Hernandez saw a notice on the inside of the window of the Operation Manager's

office. All of the employees would have to pass the office as they were going to their work areas. The notice said, according to Hernandez, that "whether the strike was legal or illegal, they could keep employees out of employment in the Company for more than three years by appealing this in court." The notice was typewritten in both Spanish and English.

Hernandez testified that there were no threats before the strike that employees would be fired or arrested as a result of going out on strike. He acknowledged that included with his paycheck was a notice stating that "An employee who walks out as a part of a plan or pattern of 'quickie' 'intermittent' or 'hit and run' strikes may be lawfully fired," and that "An intentional slow down of work is an unprotected activity and anyone who participates in this type of activity will be fired."

Luz Hernandez has been employed since August, 1980. She worked at the 607 facility. She saw various signs posted at the facility throughout the month of May. Some were handwritten and some were typewritten. Some were in the cafeteria and some were in the hallway. The handwritten signs said that anyone involved in the strike would be arrested by the police because the strike was illegal.[4] The printed signs said that people going on strike would not be paid, and would not be able to collect unemployment, and that they would be replaced. She does not recall any of the printed signs saying that employees would be arrested or fired.

Martha Galvan has been employed since August 2, 1979. She worked at Facility 607. She saw a notice posted near the payroll office on June 2. The notice said that the strike that was to take place the following day was illegal, and everyone who went out on strike would be permanently replaced. The sign was in Spanish. General Manager Paul Norman posted this notice. The notice was handwritten and was not signed. To Galvan, permanently replaced means the same as being fired.

---

[4] Hernandez testified that she found similarly worded papers in her locker, although there is no evidence that they were placed there by the Respondent.

Isidro Barrientos has been employed since April 16, 1981. He worked at Facility 607. He saw several managers post notices. On the day before the strike, General Manager Jose Ramirez posted two notices, one in the cafeteria and one near the restroom which is near the payroll office. The signs, which were in both Spanish and English, and which were handwritten, said that any person who went out on strike would be fired, and would lose all unemployment benefits because the strike was illegal, and any person engaged in a slowdown or trying to obstruct the normal functions of the Company would be considered to be on strike. Signs posted by Production Manager Paul Norman and Human Resources Manager Carmen Nassar, said the same thing.

Mauricio Perez has been employed since August 16, 1986. On June 2, Perez saw General Manager Jose Ramirez post a paper under the window of the payroll office. The sign, in green crayon, stated that any person participating in the strike would be permanently replaced. Perez saw several signs posted during the month of May stating that anyone who interfered with the work of another employee would be fired. He did not see any signs that stated that anyone who became involved with the strike would be fired.

Perez testified that, in Spanish, permanently replaced is the same as being fired.

Yeshewas T. Kefayelew has been employed since April 14, 1984. In May a typewritten notice was posted near the cafeteria. The notice said that "if you guys are going to strike you're going to lose your job and your benefits." It also said that "the strike is illegal, or — a lot of stuff...but I don't remember the other things." It did not say that employees would be fired or arrested if they went out on strike.

Daniel Godoy has been employed since June 24, 1980. He testified that on one sign that he saw General Manager Jose Ramirez post, both the words "fired" and "replaced" were used. Another sign said that employees would be permanently replaced. Another sign, written by hand, said that employees were going to be "fired automatically." Another sign said that if employees went out on

strike and caused trouble they could be arrested. However, Godoy did not see any signs that said employees would be arrested for only going out on strike.

Fulgencio Plascencia has been employed since November 9, 1976. In the latter part of May, she saw a notice posted on the walls of the cafeteria and near the bathroom. The notice said that "if employees went out on strike it could be illegal," and "automatically we would be terminated and replaced." Plascencia's affidavit, however, states that the notice stated that if employees blocked the driveway or the street they would be arrested; and that "I don't recall if the notice said that the strike will be illegal."

Miguel Gonzalez has been employed since May, 1978. He worked at the 607 Facility. He saw one notice posted during the month of May in the hallway near the cafeteria. It was in Spanish and English, and was in longhand. It stated that the employees should be careful because the strike was illegal and if the employees went on strike they would be fired and replaced.

Nora Williams has been employed since March, 1989. She testified that before the strike started she saw General Manager Jose Ramirez posting notices, in Spanish and English, on the wall near the restroom and the cafeteria. Manager Saul Monroy was assisting Ramirez. As Williams approached, Monroy told her that she had better read it because it was for her. He was teasing her about it. The notice, which was handwritten, said that if employees "walked off and went on strike you were fired." However, according to Williams, the notice contained both the words "fired" and "replaced."

Willie Land has been employed since May 5, 1977. She worked at the 607 Facility. A few days prior to the strike she saw a notice posted in the hallway leading to the cafeteria. It was typewritten. It said that if the employees went out on strike they would be permanently replaced.

Victor Saldana has been employed since May 25, 1990. Prior to the strike he saw several managers posting notices: General Manager Jose Ramirez, Manager Jose Castillo, and Human Resources Director Millie Bisono. The notices were posted throughout the department: in the hallways, the cafeteria, the entrance way,

near the time clock, and on the stairwells; it looked like a museum to him. Most of the notices said the same things. Some were in longhand, some were typewritten. One of them stated that the employees were going on strike and would be permanently replaced, "which means," according to Saldano, "that we were going to be fired." The sign also apparently said that the strike would be illegal. Thus, Saldano interpreted the sign to mean that, "the strike would be illegal, and we were going to get fired." Some of the notices, according to Saldano, said "permanently replaced," and some of them said "fired." He interpreted this as a threat. The exact words on the handwritten notices were that, "any person being part of the strike would be definitely replaced and fired." On some notices both words were used.

Daniel Godoy began working for the Respondent on June 24, 1980. He worked at the 607 Facility. He saw General Manager Jose Ramirez putting up a notice on June 2, one day before the strike. He also saw signs in May. One sign said that if the employees went out on strike they would be replaced by 300 or 400 people who had already been hired, and that employees would be fired automatically because the strike was illegal.

Willie Land has been employed since May 5, 1977. She testified that she was never approached by anyone to sign the petition, and saw no signs to the effect that employees would be arrested, or that a strike would be illegal, or that employees would be fired if they went out on strike.

3. Respondent's involvement with the petition; Posting and distribution of notices

Millie Bisono is Regional Human Resources Director for the Western Region of the Respondent. Bisono testified that in February, there were approximately 750 employees in the bargaining unit. Although the contract contained union security and checkoff provisions, only four hundred and three employees were having dues deducted from their paychecks. As the expiration date of the contract approached, various employees asked her how to get rid

of the Union. In response to these inquiries the Respondent prepared two different information sheets, and provided these only to employees who inquired about the matter. Bisono provided such material to employees Bonnie Metcalf, Glicerio Cuellar, and Xiomara Menendez.

The information sheets are printed in both Spanish and English. One of the sheets is entitled "Facts about Union Decertification." It explains that employees may request the Board to hold an election to decide whether to remove a union, and that the period for filing such a petition is 90 to 60 days prior to the expiration of the union contract, which, "in this case begins March 2, 1991." It advises employees as to the form and format of the petition. Further, it warns employees that a union will often try to delay a decertification election by filing unfair labor practice charges, and that:

> To keep the union from taking advantage of this delay the petition may be signed by more than 50% of the employees and a copy given to the company. This allows the company to lawfully refuse to negotiate with the union and possibly make wage and benefit changes after the contract expires. If more that 50% of the employees sign the petition it is evidence to the NLRB that a majority really don't want the union.

The notice goes on to state that decertification petitions should not be signed during work time in work areas, and that it is unlawful for unions to threaten or act against employees because of their decertification activity. Further, the notice states that although it is unlawful for management to actively promote or sponsor the petition, "However, the company can answer some procedural questions if asked by employees."

The second information sheet is entitled "Employee Questions and Suggested Answers on Decertification." It is similar, although less detailed, than the aforementioned information sheet.

Human Resources Director Bisono testified that on about May 2, the Respondent posted a notice entitled "Union Decertification Election," in which it advised the employees that

the Union had filed a charge against the Respondent "based on alleged company involvement with the collection of signatures for the decertification petition." The notice goes on to say that the Union will attempt to deprive the employees of their right to vote to determine whether or not they want union representation, and will do everything in its power to delay the election; however, the Respondent will make every effort to expedite the process.

On May 16, the Respondent posted a notice entitled "Expiration of Union Contract," in which it advised the employees that after the contract expires the Respondent will continue to serve its customers even if there is outside interference by the Union. Further, if the Union asks the employees to strike, the employees have the right to say no and to continue working, and the Respondent will take whatever action is necessary to protect the safety of its employees at work and continue serving its customers.

Bisono testified that on Sunday, June 2, General Manager Jose Ramirez prepared and posted handwritten copies of a notice at various places in Facility 607. Later that morning, when Bisono arrived at work, she made typewritten copies of the notice and substituted them for the handwritten copies. This notice, which was posted inside the glass window of the payroll office, in the cafeteria, and by the timeclocks, is as follows:

QUESTIONS OF CONCERN

Q. What happens if we go out for one (1) day or short periods of time, and then we come back to work?

A. An employee who walks out as part of a plan or pattern of "quickie" "intermittent" or "hit and run" strikes may be lawfully fired. Such strikes are unprotected and employees who walk out like that are properly discharged under the law.

Q. What happens to employees who intentionally slows down productivity?

A. An intentional slow down of work is an unprotected activity and anyone who participates in this type of activity will be fired.

Bisono was aware of no handwritten notices stating that employees who went on strike would be fired or arrested, or that any strike would be illegal. Notices of this description, according to Bisono, were not posted by the Respondent.

Bisono testified that during the course of various company meetings, infra, certain matters were frequently brought up, and the Respondent prepared a question and answer sheet, consisting of two pages, which responded to the questions most frequently asked during the employee meetings. This document, in both Spanish and English, was included with each employee's paycheck on May 30, several days prior to the commencement of the anticipated strike. Also, poster-size reproductions of the question and answer sheet were posted in the cafeteria, in the hallway, and by the timeclocks.

The aforementioned document advises employees, inter alia, in a question-and-answer format, that they will be prosecuted and discharged if they engage in serious strike misconduct; that the Union's representations that any strike it calls will automatically be an unfair labor practice strike is erroneous, and that the Respondent is prepared to take this matter to court and this process will take two to three years; that if the final decision is that the Respondent's actions were lawful, the Respondent could keep the replacement workers, and would not have to discharge them. The following question and answer is also contained in the document:

> Q. Does the Company have to shut down if the union strikes?
>
> A. No. Caterair has an absolute legal right to continue to operate if there is a strike or picket line. If necessary, we will hire new employees to permanently replace those who do not cross the picket line. A replaced striker is not entitled to return to work as long as the replacement wants to continue working whether that's a year, or 10 years or forever. Many strikers have effectively lost their jobs by being permanently replaced.

3. Meetings conducted by the Respondent

Jose Burgos began working for the Respondent on January 22, 1987. He attended a meeting on about May 22 at the Respondent's 607 facility. About 20 to 25 employees were present. Human Resources Manager Roberto Velasquez conducted the meeting. Velasquez said, according to Burgos, that strikes in California were illegal, that any person who became involved in the strike would be permanently replaced, and that the replaced employees would be on a waiting list until another position was available.

Mauricio Perez began working for the Respondent on August 16, 1986. He worked at the 607 Facility. He attended a company meeting in May. About 45 employees were in attendance. Roberto Velas quez said that he called the meeting to advise the employees that if "we go on strike, it was going to be an illegal one, and they were going to replace us, and the employees could be arrested." Perez asked why the Company didn't give the employees a raise to prevent a strike instead of spending the money to train new people to replace the strikers. Velasquez said that he was interested in his clients, the airlines, and not the employees, and that everyone who became involved in the strike was going to be permanently replaced.

Nora Williams began working for the Respondent in March, 1989. She worked at Facility 607. In late May she attended a Company meeting. General Manager Jose Ramirez, Human Resources Director Millie Bisono, and Labor Relations Director Roberto Velasquez were present. Velasquez said, according to Williams, that if the employees went on strike for one day they would be fired. He told them that they could remain at work if they wanted to, and that there was a place to pick them up if they wanted to come to work. He said that "he had already planned for the strike and we were already replaced," and that he had been interviewing for two to three weeks. He said something about "block,"(apparently referring to blocking charges filed by the Union in order to prevent an election), and said that if the Union takes it to the labor Board it could take from two years to 5 or 10 years to get their jobs back, and that maybe they would never get their jobs back. Williams asked

why she didn't get a raise, and Velasquez replied that the Union kept her from getting a raise. Williams then left, and the meeting continued.

Victor Saldana attended two meetings about a week before the strike. General Manager Jose Ramirez and a translator were present. Ramirez spoke in Spanish, and his remarks were translated from Spanish to English. Human Resource Director Millie Bisono was at one of the meetings. Each meeting was attended by between 15 to 20 employees. Ramirez said that the employees had an opportunity to vote to say no to the Union, and asked why the employees should have to pay $15 per month when they "could have other benefits with those $15?" Saldana asked him a question regarding salaries, and Ramirez did not answer it. Saldana left the meeting because he was angry.

At the second meeting Ramirez said the strike was illegal. He always said that, according to Saldano. Ramirez said that the employees were going to be replaced, and that there would be problems if strikers blocked deliveries or people who wanted to work.

Millie Bisono testified that in late May, the Respondent held employee meetings at its three locations. The purpose of the meetings was to give the employees information regarding the Respondent's rights and the employees' rights during a strike. The schedule for the meetings was posted and attendance was not mandatory. The meetings lasted from between 15 to 45 minutes, depending on the questions and the discussion. Labor Relations Director Roberto Velasquez conducted about 90 percent of the meetings; Bisono conducted the remainder. The employees were told that they would be permanently replaced if they went on strike, and that the Respondent would continue to service its customers. Employees were not told that they would be fired or terminated or arrested if they went out on strike.

Roberto Velasquez is not currently employed by the Respondent. He was formerly Director of Labor and Employee Relations for the Respondent, and was headquartered in Bethesda, Maryland. Velasquez testified that he visited the Respondent's facilities during the last several weeks in May in order to conduct employee meetings and convey the Respondent's position as expressed in the

aforementioned posted notices. He conducted between 10 and 15 meetings with the employees. As a result of the various meetings, the Respondent prepared a list of questions and answers, and this list was distributed to each employee prior to the strike.

Velasquez testified that a question commonly asked during the meetings was whether employees would be fired if they went on strike. Velasquez made it a point in Spanish to differentiate between firing an employee for causing harm to the Company and thereby giving the Company a reason for terminating the employee, and permanently replacing an employee who chose to strike. He gave the employees specific examples, and said, for instance, if employee X would go on strike, then the Respondent would hire employee Y who would continue to work; employee X could not return until employee Y chose to leave the Company. At no time did he say that employees would be fired for engaging in a lawful strike. Nor did he say that a strike would be illegal, or that employees would be arrested in the event of a lawful economic strike.

On cross-examination, Velasquez acknowledged that he told employees that "anyone who went on strike would automatically be replaced." He explained that he told the employees that "automatically replaced" meant that the Respondent "would be looking at replacing them by bringing other people into work."

4. Alleged solicitation by Company Managers

Ms. Luz Davalos has worked for the Respondent since September 9, 1985. She worked in the accounting department at Facility 607. Davalos testified that on about February 22, Transportation Manager Jose Castillo called her on the phone in her office and asked if she had signed the paper to get rid of the Union. Davalos said she did not know what he was talking about, and Castillo said he would send someone to talk to her.

Davalos testified that she told three other co-workers about this conversation. They told her that they had been solicited by employee Delores Vasquez, another accounting clerk, but they did not sign the petition.

A half-hour after her phone conversation with Castillo, employee Delores Vasquez came to her office. She asked Davalos to sign the paper to get rid of the Union, and stated that the Union was just taking money from the employees, and that Davalos should not be a dummy. Davalos said that she respected Vasquez' position, but that she would not sign the petition. The petition presented to her was a yellow sheet of lined paper with signatures on it. Thereafter, according to Davalos, Vasquez kept "begging" her all that day to sign the petition, and said that Davalos was the only one left who had not signed.

About two hours later Davalos saw Transportation Manager Castillo in the cafeteria. He walked up to her and, in a whisper, asked whether someone had spoken to her about the matter. Davalos said yes. She thanked Castillo, and said that she was not interested in signing anything. Castillo didn't reply.

The following day, while Davalos was in the cafeteria during her lunch period, she observed that Dishroom Manager Saul Monroy was talking to three or four employees. Monroy had his back to Davalos, but she noticed that he was holding the same type of paper that Vasquez had shown her the day before, and that Monroy was handing the employees a pen. She was unable to identify them, and did not see any employee sign the petition. Later, the same employees came up to her and asked if she knew what the paper meant. They told her that they had refused to sign.

Jose Ordonez has worked for the Respondent since June 23, 1981. He worked at Facility 607. On about May 15, he observed Manager Saul Monroy talking to five or six employees in the Dishroom, but he was some 150 feet away and did not know what Monroy was talking to the employees about.

Teresa Reveco began working for the Respondent in August, 1983. She worked at the 607 Facility. On February 26, she saw Manager Oscar Peralta talking to Israel Lopez in the cafeteria. Six or seven employees were present. Peralta asked Lopez to sign

a paper which he said was a petition to get the Union out. Lopez laughed at him and asked why Peralta believed he would sign to get the Union out as Peralta was well aware that Lopez favored the Union. Peralta smiled and put the paper inside his jacket and left. Reveco did not see Peralta ask other employees to sign.

Israel Lopez has worked for the Respondent since December 20, 1978. He worked at Facility No. 308. About 100 employees work at this facility. He first became aware of the decertification petition on February 12 when an employee asked him to sign it. He refused. On February 26, Assistant Manager Oscar Peralta approached him in the cafeteria and said he had a petition to get the Union out. He asked Lopez if he wanted to sign it, and said that no one would know because it was secret, and that there would be no problem if he didn't want to sign it. Lopez looked at the petition, and noticed some signatures on it. The paper was white but didn't have any lines on it. He refused to sign, telling Peralta that as a shop steward and a representative of the Union he could not sign the petition.

On the same day, Lopez observed that Assistant Manager Peralta was having a similar conversation with Hector Hernandez. He heard Hernandez tell Peralta to "go fuck himself, that he was not going to sign any type of paper." Peralta laughed.

Lopez testified that he told about 20 employees about the aforementioned incidents; however he was able to identify only about five or six of these individuals. When relating to them what had occurred, he told each of the 20 employees that Peralta had told him that there would not be a problem if he didn't sign the petition.

Jose Lara began working for the Respondent on June 19, 1980. On about February 22, at the 607 Facility, he observed Manager Saul Monroy talking to various employees. He did not recall their names. Lara testified that Monroy was asking employees to sign a piece of white paper that was on top of a yellow pad of paper. He was not sure how many employees he observed signing the paper,"because I went to pick up what I was going to get and left," but he believed that about three employees signed it. He was

about 75 feet away from Monroy and the other employees during this occurrence. That morning an employee in his department was circulating a paper to get the Union out. Later that day he saw Monroy talking to about 5 other employees. He identified three of them, and testified that he saw one of these individuals, whom he identified as Inez, sign the paper. He was about 20 feet away, but was not close enough to see the signatures on the paper or hear what anyone was saying.

Jose Manuel Vasquez began working for the Respondent on May 25, 1989. He worked at Facility 607. Vasquez testified that about the end of February he was asked by Manager Saul Monroy to sign a list. Monroy told him that "he was taking the signatures so that the Union will stay in." Vasquez noticed about 10 to 15 signatures on the list; he just kept on working and did not sign it. Vasquez further testified that "I don't remember the exact words that he [Monroy] told me, but I think he was asking me to sign that list." Vasquez knew that there was a petition being circulated to get rid of the Union, and believed that Monroy was trying to deceive him. He did not tell any other employees about this incident. However, other employees told Vasquez that Monroy approached them and asked them to sign the paper.

Daniel Godoy testified that it was very clear that management was collecting signatures because "you could see that some of the employees were on the side of management." However, he never saw any members of management circulate the petition. Rather, he saw only employees circulating it.

Rosa Rayas began working in May 1990. She worked in the 607 Facility. On about February 22, Manager Albert Pacheco came up to her while she was working, and asked if she had signed the list to get rid of the Union that was being circulated by her co-workers. Pacheco told her that it was a list to collect signatures to get the Union out "so that we won't have elections." He said that if the Union did win, the Union would charge her for back union dues for one year which amounted to more than $200; and that the Union was no good for her because it actually was a Mafia. He told her to sign the petition because many of her co-workers had already signed and they only needed a few more signatures to get the

amount of signatures that the Government requires to get the Union out. Rayas asked what would happen to her if she did not sign. Pacheco replied that he had no idea, and that those decisions were going to be made by the people up above.

Carlos Sosa began working for the Respondent in May, 1983. He worked at the 607 Facility. On February 21, he had a conversation with Manager Saul Monroy in the dishwashing area. Monroy showed him a list on a clipboard; the list contained about 9 signatures. Monroy asked him to sign so that the employees could obtain better salaries, a cheaper health program, and more days paid vacation. Sosa told him to show him something in writing to assure him that he would be getting those benefits, and Monroy told him not to worry about it and just sign the paper. Monroy also told him not to sign unless he wanted to, and did not indicate in any way that Sosa's job would be in jeopardy for not signing. According to Sosa, Monroy made no threats or promises. Sosa refused to sign.

Sosa observed Monroy talking to other employees in the same department. Monroy had the clipboard with him with the list of signatures, but Sosa did not overhear the conversations. Other employees, prior to this time, were also soliciting signatures, and he saw Monroy talking to these people. Sosa did not see any employees sign the petition.

Alfred Mercado began working on July 6, 1990. He worked at the 607 Facility. On February 26 or 27, he was approached by Manager Saul Monroy, who asked him if he would sign a piece of paper. The paper was attached to a clipboard. Monroy didn't say what the paper was for, and Mercado refused to sign. After that he saw Monroy talking to three other employees. While his affidavit states, "I did not observe Monroy speaking with other employees," Mercado said this was a mistake and that he did see Monroy talking to other employees.

Teresa Revco testified that when she went to pick up her paycheck from the accounting department, an accounting clerk, Irena Velo, who is a unit employee, told her that if she would like to get her check she should sign a petition to get the union out. Velo showed her the petition. Revco refused to sign, and was given her

paycheck. Revco testified that there were about 10 employees in line, and she did see other employees sign the paper. No managers were present in the accounting office at this time.

Victor Saldana began working for the Respondent on May 25, 1990. He worked at the 607 Facility. In late February, Manager Saul Monroy showed him a clipboard with a paper attached, and asked him to sign. Saldana was not able to read what was on the paper because it was covered with another sheet of paper, and Monroy asked Saldana if he would sign it to get the Union out. Monroy said it would be good for him to sign, but that he should not sign if he didn't want to. Monroy said, "Why do you have to pay $15 per month and when they fire you, you're not going to get any help?" Saldana refused to sign and Monroy said fine. Saldana told six or seven other employees about this conversation.

Myrna Silva began working on May 1, 1990. She worked at the 607 Facility. On February 25, she saw Manager Saul Monroy talking to about 10 employees about signing a paper that Monroy was carrying. About half the page was filled with signatures. She heard Monroy ask employees to sign the paper to get the Union out because the Union was stealing from them and was of no advantage to the people. She did not see any employees sign the petition. Monroy did not approach her.

Silva testified that she wanted to do whatever she could to help the Union. Her affidavit states:

> Approximately on 2/25 of "91 I saw Saul Monroy, the supervisor of the Dishroom...he was carrying a piece of paper that he had on top of a booklet, talking to employees. As he was talking, he was taking notes on that piece of paper. I did not see any employees signing. I can hear Monroy tell the employees that the Union was stealing from us and it was no advantage to us to have it. I saw him talking to the employees of his area, which are approximately 20 employees. I did not talk to Monroy.

Irene Velo is Office Supervisor at the 308 Facility. She is a unit employee. She is involved with the payroll and distribution of paychecks from the accounting office at that location, and reports

to the General Manager. She testified that there was no decertification petition in the office near the payroll sign-up sheet which employees were to sign when they picked up their paychecks; nor did she instruct any payroll clerks to ask employees to sign a decertification petition as they picked up their paychecks. She did not see any managers soliciting employees to sign the petition.

Cecilla Sanchez works at the 607 Facility. Saul Monroy was a manager in the kitchen where she works. Sanchez testified that neither Monroy nor any manager asked her to sign a petition to get rid of the Union. In fact, she never knew about the petition, and her five co-workers never talked to her about it.

Inez Phipps works at the 607 Facility. Phipps testified that Manager Saul Monroy never asked her to sign a decertification petition. Rather, employee Delores Vasquez did ask her to sign. Phipps did not see any managers asking employees to sign the petition.

The testimony of Sonja Montufar was substantially similar to the foregoing testimony of Phipps. Montufar further stated that Monroy usually carried a yellow booklet containing reports and things, and would make notes on this booklet.

Transportation Manager Jose Castillo testified that he did not ask employees to solicit signatures on the petition, and denied that he asked Luz Davalos to sign the petition. While he has occasion to talk to Davalos regarding work-related matters, he knew her to be an outspoken supporter of the Union, and did not ask her to sign the petition. Further, he did not send Delores Vasquez to ask Luz Davalos to sign the petition. Castillo testified that he attended various management meetings, and was told at these meetings that managers were not to become involved in the circulation of the petition.

Albert Pacheco is Production Manager at the 607 Facility. Pacheco testified that he did not ask any employees to sign the petition. He did not tell Rosa Rayas that management would take reprisals against her if she didn't sign the petition. He did recall that Rayas asked him what would happen if there were not enough signatures on the petition, and he replied that he didn't know about

that. Employees did ask for his opinion about the petition, and he told them that if they signed the petition the Union would no longer exist, and if the Union were to go away they would no longer have to pay Union dues.

Oscar Peralta is Assistant Manager in the kitchen. Israel Lopez works under his supervision. Peralta testified that in February, he asked Lopez to sign work-related papers when he saw him in the cafeteria. Lopez refused to sign the papers, and Peralta testified that he does not know why he did not reprimand Lopez for refusing to sign. Peralta denied that he carried a copy of the petition or that he asked Lopezor any other employee to sign the petition.

Saul Monroy is Manager in the Dishwashing or Sanitation Department. Monroy testified that in the course of his daily work he carries various work related papers. He does not carry a clipboard; rather, he usually carries a legal pad. As part of his duties, he periodically reviews and updates employee's phone numbers in the event he must phone them to fill in for absent employees, and he regularly discusses matters with employees who work for him. Monroy testified that he never carried a petition or asked employees to sign a petition. Specifically he denied asking Victor Saldano, Alfredo Mercado, Carlos Sosa, Jose Vasquez, Cecilia Sanchez, Inez Phipps, or Sonja Montufar to sign the petition. Moreover, he did not hold meetings or speak to groups of sanitation or dishwashing department employees about the petition, and did not ask them to sign. He attended the management meeting where it was explained that managers were not to become involved with the petition. He did not see any other managers asking employees to sign the petition, and did not know until the day of the strike that a strike was imminent.

Employee Ildefonso Rivas works in the Sanitation Department, also known as the Dishroom. Rivas testified that he asked his co-workers to sign the petition. He did this on his-own volition, and management did not ask him to circulate the petition or offer any rewards. Rivas testified that neither Manager Saul Monroy nor any other manager asked employees to sign the petition.

The testimony of employees Marina Barraza, Eduardo Cardenas, and Xiomara Manendez is substantially similar to the foregoing testimony of Rivas.

Robert Dominguez began working on May 5, 1990. He worked at the 607 Facility. In March an employee by the name of "Glacedio" came up to him and asked him to sign a paper. There was no heading on the paper; it was just a lined sheet with names on it. The work area was noisy, and Dominguez just heard "Glacedio" say, "for the Union." Therefore, he believed it was a paper in favor of the Union, and he signed it. Dominguez identified his signature on the petition, and testified that he would not have signed it if he knew that it was a petition for decertification.

Glicerio Cuellar is Communications Supervisor at the 607 Facility. He is a unit employee. He testified that he solicited employees to sign the decertification petition, and did not tell employees that the purpose of the petition was to keep the Union in. Some time before he commenced circulating the petition, he asked Human Resources Director Bisono about the matter. She was not helpful and said that "it was not time for us to talk." However, apparently on a subsequent occasion, she did give him a paper entitled "Facts about Union Decertification."

5. Alleged interrogation and threats

Jerry Hayes has been employed since August 10, 1986. He works at the 607 Facility. A week before the strike he received a flyer from Human Resources Manager Millie Bisono. She told him that he should read it very carefully because if he went out on strike he would be fired. The paper she gave him said that he would be permanently replaced if he went on strike, and did not say the same thing that Bisono told him. Hayes testified that to him "fired" means the same as "permanently replaced," as it is a permanent separation from employment.

Daniel Godoy testified that about two months before the strike General Manager Jose Ramirez called him to the office and said that he wanted to talk to him very frankly, that he did not want

to beat around the bush. He said that he learned that Godoy was talking to some of the people about going on strike, and that Godoy was an agitator with the employees, and was doing illegal things within the Company and could be fired. He said he learned this from other employees. Godoy said that was not the truth, and that, "You're going to have to be sure of what you're saying to me, because I don't need other people to do my things, and that's what you do."

Fulgencio Plascencia was hired on November 9, 1976. He worked at Facility 607. On May 31, he had a conversation with Labor Relations Director Roberto Velasquez on the loading dock. Another employee, Castulo Flores, was present during part of the conversation. Velasquez asked Plascencia what he thought the Union was going to do when the contract expired that night at midnight. Plascencia said that if it was necessary the employees would probably go on strike. He asked Velasquez why the company refused to renew the contract. Velasquez said that they did not want the Union in the Company anymore, and that was why they had to get the Union out any way they could. Plascencia quoted Velasquez as stating that, "[W]e were going to find out who had more balls, the Company or the Union."

Velasquez further stated, according to Plascencia, that the Company was ready to wait as long as possible, no matter how long it was; that everyone who went out on strike would be "automatically fired"; that if employees were going to be walking around in front of the entrances and exits of the parking lot they were going to be arrested by the police; that the Company was prepared for any type of a strike, and he was positive that they were going to be able to throw the Union out; and that although it didn't cost anything to give them the benefits they wanted, the Company was not going to give the employees anything and was not going to sign the contract.

Plascencia acknowledged that he is known in the shop to be a strong union supporter. His affidavit does not contain the statement that Velasquez said the Company would get the Union out any way it could. Plascencia further testified that Velasquez did say that the employees would be both "terminated and replaced."

Castulo Flores began working for the Respondent on April 2, 1979. He worked at Facility 607. Flores testified that he overheard part of the aforementioned conversation between Plascencia and Velasquez on May 31. Velasquez, according to Flores, said that if the Union was going to strike, they would see who had more balls, the Company or the Union; that the Company was prepared for this strike or any other strike, and had extra money, not only for this strike, but for more; that he was not ready to negotiate with the Union now or ever; that he wanted the Union out; and that he was thinking about never negotiating with the Union.

Flores' affidavit states that he did not overhear Velasquez make any comment about the Company not wanting the Union, or about kicking the Union out.

Two or three days before the strike, Roberto Velasquez and, apparently, some other manager were talking to Flores and another employee in the cafeteria. They asked what the employees thought about the strike, and the employees replied that they were not thinking anything about it. Velasquez said that if the employees went on strike they were going to be, "completely fired" from the Company; that "we were already replaced by someone else"; that "there was no law in our favor — or there was no law to protect us whatsoever...to think about it, to stay inside the Company and not go on a strike because otherwise we were going to be fired from the Company." Velasquez also made reference to another labor dispute involving replaced strikers.

Willie Land testified that on June 3, Manager Jose Castillo asked her if she was going to join the strike. The conversation occurred as Land, who had worked for only two hours that day, was then preparing to leave the premises. She said yes. Castillo said that if she left the premises she would no longer have a job. Land mentioned this conversation to perhaps three other employees, including Nora Williams. It was stipulated that Nora Williams would so testify that Land related the conversation to her.

Transportation Manager Jose Castillo testified that in the early morning of the day of the strike he was assigned to watch Marcos Godoy because the Respondent suspected, from the reports of other employees, that he might engage in sabotage. He followed

Godoy around, and at 4:00 a.m. Godoy told employees that it was time to leave and, apparently, to begin the strike. Castillo followed Godoy and other employees outside of the building, and, upon returning, he had a conversation with another group of employees. He told them that if they were going to to leave work to join strike the Company would have the right to replace them permanently. He said nothing to any other employees about the strike, and does not recollect any conversation with Willie Land. Castillo testified that from time to time managers may ask employees to sign work-related papers.

Labor Relations Director Roberto Velasquez recalled having several discussions with Fulgencio Placencia in the cafeteria. He did not tell Placencia that the Company would have to get rid of the Union any way it could, but did tell him that the Company would have to continue catering the airlines any way it could. He also said that the decertification petition meant that a majority of the employees did not want the Union, and therefore the Company felt it was not obligated to negotiate with the Union. He did not say that the Company did not want to give the employees anything.

Human Resources Director Bisono testified that on June 2, she happened to encounter employee Jerry Hayes on the stairs. She told him that there was an impending strike, and she gave him a copy of the aforementioned notice which she happened to have with her at the time. She did not tell him that he would be fired if he went out on strike.

Bisono testified that when the strike began the strikers obstructed individuals who were attempting to enter and leave the premises. On June 4, the day after the strike began, the Respondent obtained a restraining order from the Superior Court for Los Angeles County, setting parameters regarding the picketing and related strike activity.

5. Union meetings regarding the strike vote

Jose Ordonez attended a union meeting on May 22. Business Agent and Organizer David Luna conducted the meeting. About 50 employees were present. Luna asked if the employees wanted to go on strike, and handed them a ballot. The strike was called, according to Ordonez, because the company refused to negotiate the contract.

Isidro Barrientos attended a union meeting regarding the strike. A show of hands was taken to see whether the employees wanted to go on strike. This was not the May 22 meeting during which the strike vote was taken. It was stated by a union representative that the Respondent was refusing to negotiate with the Union.

Daniel Godoy attended the strike vote meeting on May 22. He voted by ballot. He testified that there were various reasons for going on strike: the Company did not respect the employees' rights and wanted to get the Union out; the Company was collecting signatures from some of the people by deceiving them and telling them that the petition was in support of the Union; and also because, when the contract expired, the Company refused to negotiate.Godoy's affidavit states that the strike was called because the Company was refusing to sign a contract and give the employees any benefits.

Miguel Gonzalez attended the union meeting on May 22 when the strike vote was taken. He testified that the employees went on strike because the Company refused to negotiate a new contract.

Willie Land testified that the strike was in protest of the Respondent's refusal to renew the contract.

6. Failure to reinstate striking employees; wage adjustments

Vincente Carrillo began working for the Respondent in 1976. He worked at Facility 308. In November, following the Union's October 3 offer to return to work on behalf of the striking employees, he was picketing outside the 308 Facility and saw new employees entering the building. Between November 12 and 17 he

observed five new employees. He was able to obtain the names of three of them, namely, Eduardo Avilar, Maria Quadalupe, and Adriana Fierro.

Human Resources Director Millie Bisono testified that the policy at Facility 308 was to hire employees from employment agencies as temporary labor for entry-level positions to fill in for absent employees or employees on vacation. The Respondent continued this process at Facility 308 after October 3, the date of the Union's offer, on behalf of the striking employees, to return to work. The Respondent discontinued using such temporary agencies on or about the first week in December, after receiving a charge alleging that such conduct was unlawful. No temporary employees were used subsequent to October 3, in Facility 607 or Facility 380.

Bisono further testified that after October 3, the Respondent hired only one permanent replacement, a mechanic at Facility 308, after offering the job to qualified employees on the recall list. There were no other permanent replacements hired at any of the three facilities.

Bisono testified that following the expiration of the collective bargaining agreement on May 31, it initiated a three-month "wage pause," and then, effective August 31, granted employees a salary increase of from 4 to 6 percent.

C. Analysis and Conclusions

The evidence presented by the General Counsel regarding the content of the various notices posted by the Respondent is confused and inconsistent, and the employees' understanding and comprehension of such notices appears to be suspect. Further, the fact that both similar and additional information was imparted to the employees during the course of various meetings and through other notices and information sheets, that the employees were placed in the position of having to comprehend the nuances of unfamiliar concepts, and that language translation difficulties may account for some of the confusion, compounds the difficulty of ascertaining just what information the notices conveyed. Finally, the record shows that the Union has many stewards and supporters who read

the posted notices and testified to their content, and it appears that it would not have been difficult for union stewards or other employees to copy the wording of the notices verbatim in order to preclude any difficulties with comprehension or interpretation.[5] Accordingly, I conclude that the record evidence is insufficient to show that the information imparted by the notices is violative of Section 8(a)(1) of the Act, as alleged.

In addition, I find that the employees' comprehension of verbal statements by the Respondent's representatives during the employee meetings is, for many of the foregoing reasons, similarly unreliable. Such testimony appears to be a composite of what the employees' actually were told, what they understood, and what they interpolated both from what they were told and from the language of the notices which they had read. Moreover, there were many meetings, and there was no corroboration of any employee's testimony regarding what transpired at any particular meeting. As such, I am unable to conclude that the credible and reliable evidence establishes that the Respondent's verbal statements were violative of Section 8(a)(1) of the Act, except to the extent specifically discussed below.

I find that various managers engaged in solicitation of the deauthorization petition. I credit the testimony of Luz Davalos and find that Transportation Manager Jose Castillo called her on the phone in her office, asked her if she had signed the petition, said that he would send someone to talk to her, and that shortly thereafter an employee presented her with a petition for her signature. Further, Castillo followed up his initial inquiry by asking Davalos whether someone had spoken to her about the matter.

Regarding the solicitation of the decertification petition by Sanitation Manager Saul Monroy, I credit the testimony of Jose Manuel Vasquez, who testified that Monroy asked him to sign a

---

[5] I am mindful of the fact that an employee who took down one of the notices was discharged or threatened with discharge. However, the fact that the Respondent did not want its notices removed would not appear to inhibit a representative of the Union, such as a steward, from copying or photographing the notice language.

list "so that the Union will stay in." I find, however, that Vasquez misunderstood Monroy regarding the purpose of the list, and that, in fact, Monroy was requesting that he sign the decertification petition.

I credit Carlos Sosa, who testified that Monroy approached him in the dishwashing area with a list containing about 9 signatures, and asked him to sign it so that employees could obtain better salaries, a cheaper health program, and more days paid vacation; and that Sosa observed him talking to other employees in the same department about the petition.

I also credit Vicor Saldana and Alfred Mercado, both of whom testified that they were approached by Monroy to sign the petition, and that Mercado also saw Monroy approach other employees.

I further credit the testimony of the following employees: Myrna Silva, who testified that she saw Monroy talking to about 10 employees, and overheard him asking the employees to sign the paper to get the Union out; Luz Davalos, who testified that she saw Monroy talking to three or four employees in the cafeteria, that Monroy was holding a copy of the petition, and that he offered the employees a pen; and Jose Lara, who testified that he observed Monroy soliciting other employees, apparently in the dishwashing area.

Regarding the solicitation of the petition by Assistant Manager Oscar Peralta, I credit the testimony of Israel Lopez, who testified that Peralta approached him in the cafeteria and asked him if he would sign the petition; and that Peralta approached Hector Hernandez for the same purpose. Similarly, I credit the testimony of Teresa Reveco, who observed Peralta asking Israel Lopez and other employees to sign a petition to get the Union out.

I credit the testimony of Rosa Rayas who testified that Manager Albert Pacheco asked her to sign the petition. Further, I find that Pacheco told her that if the Union was not decertified she would be liable for back dues in the amount of more than $200. It is also significant that Pacheco told her that only a few more signatures were needed in order to get the Union out.

I do not credit the denials of managers Castillo, Monroy, Peralta, and Pacheco that they did not engage in solicitation of the petition. I find that by such conduct in circulating and requesting employees to sign the decertification petition, the Respondent has violated Section 8(a)(1) of the Act, as alleged. American Linen Supply Company, 297 NLRB No. 18 (1989); enfd. 945 F.2d 1428 (8th Cir. 1991); David's Kosher Deli, Ltd. d/b/a Maxi City Deli, 282 NLRB 742, 745 (1987); Good N' Fresh Foods, Inc., 287 NLRB 1231, 1236 (1988); RAI Research Corp., 257 NLRB 918, 928 (1981); The Hearst Corporation, 281 NLRB 764 (1986).

Having found that during the course of the unlawful solicitation Sanitation Manager Monroy told Carlos Sosa that employees could obtain better salaries, a cheaper health program, and more days paid vacation if they got rid of the Union, and Manager Albert Pacheco told Rosa Reyas that if the Union prevailed Reyas would have to pay more than $200 in back dues to the Union, I conclude that such statements were also unlawful. Monroy's statements to Sosa constitutes a promise of economic benefit in order to induce employees to sign the petition, and are violative of Section 8(a)(1) of the Act. See Technodent Corporation d/b/a Dentech Corporation, 294 NLRB 924, 937 (1989); Weather Shield Mfg., Inc., 292 NLRB 1,2 (1988), revd. on other grounds, 132 LRRM 3063 (7th Cir. 1989). Similarly, I find that, under the circumstances, Pacheco's statement to Reyas constitutes an unlawful threat of economic detriment, as there is no evidence that Pacheco's statement was premised upon his genuine opinion or belief that Rayas would be required to pay back dues to the Union.

I credit Daniel Godoy and find that General Manager Jose Ramirez summoned him to the office and told him that he had learned from other employees that Godoy was talking to some of the people about going on strike, that Godoy was an agitator and was doing illegal things, and that he could be fired. Jose Ramirez was not called as a witness by Respondent. I find that Ramirez' statement to Godoy constitutes a threat of discharge for engaging in union activity, and that it is violative of Section 8(a)(1) of the Act. See Howard and Roberta Feldman Corporation, 265 NLRB

1579, 1580 (1983); Carl H. Neuman d/b/a Sarah Neuman Nursing Home, 270 NLRB 663, 679 (1984); Bay Area-Los Angeles Express, Inc., 275 NLRB 1063, 1080-81 (1985).

I credit the testimony of Fulgencio Plascencia, and find that Labor Relations Director Roberto Velasquez told him that the Respondent did not want the Union in the Company and intended to get the Union out any way it could. Such a statement, viewed in light of the Respondent's unlawful circulation of the decertification petition, may be reasonably understood as an unqualified declaration of the Respondent's intent to use unlawful means, if necessary, to rid itself of the Union. As such, it is violative of Section 8(a)(1) of the Act. See Cannon Industries, Inc., 291 NLRB 632, 637 (1988).

Further, I find that Velasquez did tell Plascencia that everyone who went out on strike would be "automatically fired." Thus, Velasquez admitted that he told employees during the various employee meetings that they would be "automatically replaced," and followed up this remark by explaining what he meant. There is no credible evidence, however, that during his one-on-one conversation with Plascencia he proffered such a qualifying explanation. Whether Velasquez used the work "replaced" or "fired" is immaterial under the circumstances, as the remark, reasonably understood, clearly conveyed the idea that employees could immediately consider themselves to be fired or their positions to have been filled the instant they joined the strike. In this regard, the evidence shows that the Respondent did not hire employees as replacements prior to the commencement of the strike.

Similarly, I credit the testimony of Castulo Flores, and find that Velasquez told Flores and another employee that if the employees went on strike they would be "completely fired," and that they had already been replaced.

Velasquez' foregoing statements, under the circumstances, are tantamount to a threat to discharge employees for engaging in the act of striking, and are violative of Section 8(a)(1) of the Act. American Linen Supply Company, supra, Mars Sales & Equipment Co., 242 NLRB 1097, 1101, 1102 (1979), enfd. in pertinent part, 626 F.2d 567, 572—573 (7th Cir. 1980).

I further credit employee Willie Land and find that Transportation Manager Jose Castillo told her that if she left the premises to go on strike she would no longer have a job. In addition, I credit employee Jerry Hayes and find that Human Resources Manager Millie Bisono told him that if he went out on strike he would be fired. Such statements also are similarly violative of the Act.

As set forth above, I have found that four managers of the Respondent unlawfully solicited employees to sign the decertification petition. The Respondent maintains that even if it should be found that its managers did so, their interference with the circulation of the petition was insignificant when viewed in context, and was insufficient to taint the petition: only a relatively small number of managers were allegedly involved in this activity; there is no showing that any of the employees solicited by management did, in fact, sign the petition; the employees who claim they were approached were not at all intimidated or otherwise coerced into signing; and all of the Respondent's employees were quite familiar with the election and petition process, having been involved in many prior Board elections within the past several years. Thus, the Respondent argues that it should not be precluded from relying upon the petition to support its decision to withdraw recognition from the Union.

The Respondent's counsel, during closing argument at the hearing, cited two cases in support of the Respondent's position. In Guerdon Industries, Inc., 218 NLRB 658 (1975), and Burger Pits, Inc., 273 NLRB 1001 (1984), enfd. 785 F.2d 797 (9th Cir. 1986), the Board stated that certain unfair labor practices committed prior to the withdrawal of recognition may not be "of such a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself," and that in such circumstances the withdrawal of recognition would not be deemed to be unlawful.

Similarly, the Board has enunciated in Chicago Magnesium Castings, 256 NLRB 668, 674 (1981), that to warrant the finding of an unlawful withdrawal of recognition, the underlying unfair labor practices must be "sufficiently serious...that they possessed

an inherent tendency to...[contribute] to the union's loss of majority status." See, also, BSAF Wyandotte Corporation, 276 NLRB 1576, 1577 (1985).

Contrary to the Respondent's position, I find that that its interference with the circulation of the petition was widespread and was not isolated or numerically insignificant in relation to the total number of unit employees. Thus, four different managers approached numerous employees and solicited their signatures in work areas and in the cafeteria, and in the presence of other employees who were in a position to observe what was occurring. Moreover, the employees who were approached related this fact to their coworkers. Although the petition was signed by 428 employees out of a unit of 750 employees, and while this constitutes a clear majority of the unit, it is a majority of only 53 employees or about 7 percent of the unit complement. Further, as the Respondent points out, although each of the employees who testified in this proceeding declined to sign the petition proffered by the managers, nevertheless the credible testimony of various employees shows that some of the petition sheets circulated by the managers did contain employee signatures; and it is reasonable to assume that employees who were confronted with such a petition by Respondent's managers would feel constrained to sign it.

Clearly, within the purview of the above-cited cases, the Respondent's foregoing widespread and conspicuous unfair labor practices in directly soliciting employees to sign the petition, with several instances of accompanying threats or promises, constitutes unlawful conduct of such a character as to cause employee disaffection, and has an inherent tendency to contribute to the Union's loss of majority status. Solicitation under such circumstances interferes with employee freedom of choice, as the signatures obtained on the petition may not necessarily reflect the true desires of the employees and may therefore not be relied upon by the Respondent as a basis for withdrawing recognition. Thus, it may be presumed that employees who signed the petition upon the solicitation of other unit employees were aware of the Respondent's efforts in this regard, and such knowledge is likely to have influenced their decision. See The Hearst Corporation, supra;

Choctawhatchee Electric Cooperative, Inc., 274 NLRB 595 (1985). Accordingly, I find that by relying upon the tainted decertification petition as the basis of its withdrawing recognition from the Union, the Respondent has violated and is violating Section 8(a)(5) of the Act. American Linen Supply Company, supra; Texaco, Inc., 264 NLRB 1132 (1982), enfd. 722 F. 2d 1226 (5th Cir. 1984), and cases cited therein; The Hearst Corporation, supra.

Having found that the Respondent's withdrawal of recognition was unlawful, I further find that its subsequent unilateral implementation of a wage increase in September, without bargaining with the Union, was also violative of Section 8(a)(5) of the Act.

The strike which commenced on June 2, was, in large part, in protest of the Respondent's March 20 letter expressing a good faith doubt of the Union's majority status, and refusal to bargain for a new agreement. As the decertification petition upon which the Respondent relied in support of its refusal to bargain had been tainted by the Respondent's unfair labor practices, it is clear that the ensuing strike was an unfair labor practice strike and the strikers were unfair labor practice strikers. See C-Line Express, 292 NLRB 638 (1989); American Linen Supply Company, supra, at slip op. p. 4, fn. 4. Accordingly, the Respondent was required to immediately reinstate such strikers, upon request, to their former or substantially equivalent positions of employment. Reichold Chemicals, Inc., 301 NLRB No. 150 (Feb. 28, 1992); Richmond Recording Corporation d/b/a Recording Company, 280 NLRB 615 (1986).

By letter dated October 3, the Union advised the Respondent that the strike was ended and that the employees were unconditionally offering to return to work on that date. In reply, the Respondent advised the Union, on October 4, that it was not true that the strike was an unfair labor practice strike and, moreover, that that "No current employee will be removed to make room for a striker." Admittedly, the Respondent failed to reinstate some strikers at its 308 Facility, and hired temporary replacements from an employment agency after October 3. While Human Resources Director Bisono testified that no other replacements were hired at the Respondent's other facilities, nevertheless it did not so advise the

Union, and its October 4 letter indicates that it was simply unwilling to remove replacement workers in order to make room for strikers. By failing to properly reinstate strikers at its 308 Facility, the Respondent has violated Section 8(a)(3) of the Act. Moreover, if it should later be determined in the compliance stage of this proceeding that the Respondent has failed to properly reinstate other strikers at any of its facilities, such conduct is similarly violative of Section 8(a)(3) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by circulating a petition among its employees to decertify the Union as the collective bargaining representative of its employees in an appropriate unit, by promising economic benefits and threatening economic harm, and by telling employees that they were discharged or automatically replaced if they went on strike.

4. The Respondent has violated Section 8(a)(3) of the Act by failing and refusing, upon the request of the Union, to reinstate unfair labor practice strikers to their former or substantially similar positions of employment.

5. The Respondent has violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and by refusing to bargain with the Union regarding the terms and conditions of a successor collective bargaining agreement, and by unilaterally granting a wage increase without bargaining with the Union.

The Remedy

Having found that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to offer the unfair labor practice strikers reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any replacements, together with backpay from October 3, 1991, the date of the Union's request, on behalf of the striking employees, to return to work. Backpay shall be computed on a quarterly basis as described in F.W. Woolworth Co., 90 NLRB 289 (1950), with interest thereon to be computed in accordance with New Horizons for the Retarded, Inc., 283 NLRB 1173 (1987).

Moreover, the Respondent shall be required to recognize and bargain with the Union, upon request, and to post an appropriate notice, attached hereto as "Appendix."

It is recommended that the decertification petition in Case 31—RD—1224 be dismissed by the Regional Director for Region 31.

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[6]

---

[6] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Caterair International, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Circulating petitions among its employees to decertify the Union.

(b) Promising employees economic benefits if the Union is decertified.

(c) Threatening employees with economic harm if they fail to decertify the Union.

(d) Threatening employees with discharge or automatic replacement if they support the Union or elect to go on strike.

(e) Utilizing a decertification petition circulated by the Respondent as a basis for refusing to bargain with the Union as the collective bargaining representative of its employees

(f) Failing and refusing to bargain with the Union as the collective bargaining representative of its employees.

(g) Failing and refusing to reinstate unfair labor practice strikers upon their request to return to work.

(h) Unilaterally granting a wage increase without bargaining with the Union.

(i) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Recognize and bargain, upon request, with the Union as the collective bargaining representative of its employees in the following unit:

INCLUDED: All food and equipment handlers and helpers, chefs, dispatcher, coordinators, executive chefs, lead cooks, cooks, assistant cooks, lead bakers, bakers, lead station attendant, station attendant, kitchen supervisors, liquor room,

keeper, storekeepers, plant clerical, clerk dispatchers, maintenance, clerk, flight assemblers, auto maintenance, and bank attendants employed by the Employer at Shop 607, 6901 West Imperial Highway, Los Angeles, California; Shop 308, 7255 World Way West, Los Angeles, California; and Shop 380, 3250 E. 29th Street, Long Beach, California.

EXCLUDED: Office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Upon request, reinstate unfair labor practice strikers and pay them back pay, with interest, in the manner proscribed in, "The Remedy" section of this Decision.

(c) Post at the Respondent's Los Angeles and Long Beach, California facilities copies of the attached notice marked "Appendix." [7] Copies of said notice, in Spanish and English on forms provided by the Regional Director for Region 31, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

---

[7] If this Order is enforced by a Judgement of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGEMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of receipt of this Order, what steps the Respondent has taken to comply herewith.

Dated: August 26, 1992

/s/ Gerald A. Wacknov
Gerald A. Wacknov
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial at which all parties had the opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and to obey its provisions.

The Act gives employees the following rights:

To organize themselves;
To form, join, or support unions;
To bargain as a group through representatives of their own choosing;
To act together for collective bargaining or other mutual aid or protection;
To refrain from any or all such activities.

WE WILL NOT circulate petitions among our employees to decertify the Union as the collective bargaining representative of the employees.
WE WILL NOT promise employees economic benefits if they decertify the Union as their collective bargaining representative.
WE WILL NOT threaten employees with economic harm if they fail to decertify the Union, or with discharge or automatic replacement if they elect to engage in Union activity or in a strike against the Company.
WE WILL NOT refuse to reinstate unfair labor practice strikers to their former or substantially equivalent positions of employment.
WE WILL NOT unilaterally increase wages without bargaining with the Union.

WE WILL NOT refuse to bargain in good faith with Chauffeurs, Sales Drivers, Warehousemen, & Helpers, Local 572, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive representative of the employees in the following unit:

INCLUDED: All food and equipment handlers and helpers, chefs, dispatchers, coordinators, executive chefs, lead cooks, cooks, assistant cooks, lead bakers, bakers, lead station attendant, station attendant, kitchen supervisors liquor room, lead sanitation, sanitation-utility, lead storekeeper, storekeepers, plant clerical, clerk dispatchers, maintenance, clerk, flight assemblers, auto maintenance, and bank attendants employed by the Employer at Shop 607, 6901 West Imperial Highway, Los Angeles, California; Shop 308, 7255 World Way West, Los Angeles, California; and Shop 380, 3250 E. 29th Street, Long Beach, California.

EXCLUDED: Office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, upon request, bargain collectively with Chauffeurs, Sales Drivers, Warehousemen, & Helpers, Local 572, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive representative of all employees in the appropriate unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, upon request, reinstate unfair labor practice strikers to their former or substantially equivalent positions of employment, discharging, if necessary, any replacements, and pay them back pay, with interest, for the wages they have lost as a result of our failure to timely reinstate them after October 3, 1991.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

CATERAIR INTERNATIONAL
(Employer)

Dated:_____By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 11000 Wilshire Boulevard, Room 12100, Los Angeles, California, Telephone 310-575-7357.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1008 **September Term, 1993**

Caterair International,
Petitioner,

v.

National Labor Relations Board,
Respondent

BEFORE: Wald, Edwards and Sentelle, Circuit Judges

ORDER

Upon consideration of Petitioner's Motion to File Petition For Rehearing Out of Time Or Alternatively, Stay Issuance of Mandate and of Respondent's Motion For Leave to File Out of Time Its Petition For Rehearing and Suggestion For Rehearing En Banc, it is

ORDERED, by the Court, that the motions for leave to file out of time are denied. It is

FURTHER ORDERED, by the Court, that the motion for stay of mandate pending the filing of a petition for Writ of Certiorari is granted. The Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

Filed: August 2, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 93-1008 **September Term, 1993**

Caterair International,
Petitioner,

v.

National Labor Relations Board,
Respondent

BEFORE: Wald, Edwards and Sentelle, Circuit Judges

ORDER

It is **ORDERED**, by the Court, that the proposed judgment submitted by respondent and filed on June 2, 1994 is approved and is adopted as the judgment of the court, superceding the judgment filed on April 29, 1994.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

Filed: August 2, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CATERAIR INTERNATIONAL	)	
Petitioner	)	No. 93-1008
	)	Board Case Nos.
	)	31-CA-18702,
	)	18900,
	)	18919,
	)	18958,
	)	19133
	)	
NATIONAL LABOR RELATIONS BOARD)		
	)	
Respondent	)	
	)	
	)	

JUDGMENT

Before: Wald, Edwards, and Sentelle, Circuit Judges.

This cause came on to be heard upon a petition filed by Caterair International to review an order of the National Labor Relations Board issued against said petitioner, its officers, agents, successors, and assigns, on December 15, 1992, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on April 5, 1994, and had considered the briefs and transcript of record filed in this case. On April 29, 1994, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order in part and remanding the case in part to the Board for further proceedings consistent with the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Caterair International, its officers, agents, successors and assigns, shall:

1.Cease and desist from:

(a) Circulating petitions among its employees to decertify the Union.

(b) Promising employees economic benefits if the Union is decertified.

(c) Threatening employees with economic harm if they fail to decertify the Union.

(d) Threatening employees with discharge or automatic replacement if they support the Union or elect to go on strike.

(e) Utilizing a decertification petition circulated by the Petitioner as a basis for refusing to bargain with the Union as the collective bargaining representative of its employees.

(f) Failing and refusing to bargain with the Union as the collective bargaining representative of its employees.

(g) Failing and refusing to reinstate unfair labor practice strikers upon their request to return to work.

(h) Unilaterally granting a wage increase without bargaining with the Union.

(i) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them under Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Upon request, reinstate unfair labor practice strikers and pay them back pay, with interest, in the manner proscribed in "The Remedy" section of the Judge's Decision.

(b) Preserve and, on request, make available to the Board or its agent for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(c) Post at the Petitioner's Los Angeles and Long Beach, California facilities copies of the attached notice marked "Appendix." Copies of said notice, in Spanish and English on forms provided by the Regional Director for Region 31, after being duly signed by the Petitioner's representative, shall be posted by it im-

mediately upon receipt thereof, and be maintained by the Petitioner for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director, in writing, within 20 days from the date of receipt of this Judgment, what steps the Petitioner has taken to comply herewith.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the case is remanded to the Board for further proceedings consistent with the Court's opinion.

Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

---

Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

---

Circuit Judge, United States Court of Appeals for the District of Columbia Cirduit

No. 94-400

Supreme Court, U.S.
FILED
OCT 26 1994
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

CATERAIR INTERNATIONAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's conclusion that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by withdrawing recognition from the union based on a decertification petition which petitioner's managers had actively solicited among the employees in the bargaining unit.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Alexander Linn Hospital Ass'n, 288 N.L.R.B. 103 (1988), enforced *sub nom. NLRB* v. *Wallkill Valley General Hosp.*, 866 F.2d 632 (3d Cir. 1989)	14
Franks Bros. Co. v. *NLRB*, 321 U.S. 702 (1944)	14
Gaylord Bag Co., 313 N.L.R.B. 306 (1993)	13, 14
Louisiana-Pacific Corp. v. *NLRB*, 858 F.2d 576 (9th Cir. 1988)	14
Microimage Display Div. of Xidex Corp. v. *NLRB*, 924 F.2d 245 (D.C. Cir. 1991)	13
NLRB v. *A.W. Thompson, Inc.*, 449 F.2d 1333 (5th Cir. 1971), cert. denied, 405 U.S. 1065 (1972)	14
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990)	10, 11
NLRB v. *Hollaender Mfg. Co.*, 942 F.2d 321 (6th Cir. 1991), cert. denied, 112 S. Ct. 1168 (1992)	14
NLRB v. *J.I. Case Co.*, 201 F.2d 597 (9th Cir. 1953)	13
NLRB v. *Maywood Plant of Grede Plastics*, 628 F.2d 1 (D.C. Cir. 1980)	12-13
NLRB v. *P. Lorillard Co.*, 314 U.S. 512 (1942)	14
NLRB v. *Savair Mfg. Co.*, 414 U.S. 270 (1973)	13
NLRB v. *Sky Wolf Sales*, 470 F.2d 827 (9th Cir. 1972)	13
Neely v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967)	10

Cases—Continued: Page

Ron Tirapelli Food, Inc. v. *NLRB*, 987 F.2d 433 (7th Cir. 1993) 14
Texas Petrochemicals Corp., 296 N.L.R.B. 1057 (1989), modified, 923 F.2d 398 (5th Cir. 1991) 11
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) .. 15

Statutes and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 7, 8, 9
§ 8(a)(3), 29 U.S.C. 158(a)(3) 7, 8
§ 8(a)(5), 29 U.S.C. 158(a)(5) 7, 8, 12
29 C.F.R. 101.18(a) 13

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-400

CATERAIR INTERNATIONAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 22 F.3d 1114. The decision and order of the National Labor Relations Board (Pet. App. 19a-20a), including the decision of the administrative law judge (Pet. App. 21a-64a), is reported at 309 N.L.R.B. 869.

JURISDICTION

The original judgment of the court of appeals was entered on April 29, 1994. On August 2, 1994, the court entered a new judgment (Pet. App. 66a, 67a-69a), superseding its earlier judgment. On July 27, 1994, the Chief Justice extended the time for filing a petition for a

writ of certiorari to and including August 27, 1994. The petition for a writ of certiorari was filed on August 29, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to December 1989, Marriott In-Flite Services (MIFS) operated two facilities (Facility A and Facility B) near the Los Angeles International Airport and a third facility (Facility C) in Long Beach, California. Employees at the three facilities were represented by Local 572, International Brotherhood of Teamsters (the Union), which had been certified by the National Labor Relations Board (Board) as the employees' collective bargaining representative on September 4, 1988.[1] In December 1989, petitioner took over MIFS' operations at these facilities, recognized the Union, and honored MIFS' labor contract, which was effective June 1, 1989 through May 31, 1991. Pet. App. 2a-3a, 24a-25a.

By February 1991, petitioner employed a total of roughly 750 employees and 57 managers at the three facilities: 450 employees and 39 managers at Facility A, 275 employees and 14 managers at Facility B, and 25 employees and 4 managers at Facility C. As of that date, 403 employees (54% of the unit) had authorized petitioner to deduct union dues and fees from their paychecks, pursuant to the union security clause of the labor contract. Pet. App. 3a, 25a, 30a.

---

[1] The Union represented a unit consisting of: all food and equipment handlers and helpers, chefs, dispatchers, coordinators, executive chefs, lead cooks, cooks, assistant cooks, lead bakers, bakers, lead station attendant, station attendant, kitchen supervisors, liquor room keeper, storekeepers, plant clerical, clerk dispatchers, maintenance employees, clerks, flight assemblers, auto maintenance employees, and bank attendants. Pet. App. 59a-60a.

2. On or about February 22, 1991, several employees prepared a decertification petition and solicited their co-workers to sign the petition at Facility A and Facility B over the course of the next seven days. Pet. App. 3a-4a, 25a. During the same period, petitioner's managers at Facility A and Facility B assisted this effort by actively soliciting employees' signatures on the petition, as follows:

a. On or about February 22, Jose Castillo, the transportation manager at Facility A, telephoned Luz Davalos at her desk in the accounting office to ask whether she had "signed the paper to get rid of the Union." When Davalos replied that she did not know what Castillo was talking about, Castillo stated that he would "send somebody else later to talk to" her. Thirty minutes later, Dolores Vasquez, a co-worker, visited Davalos at her desk, asked her to "sign the paper to get rid of the Union," and told her "not to be a dummy." Davalos refused to sign the petition. Castillo approached Davalos two hours later in the cafeteria and asked her whether someone had spoken to her about the petition. Davalos responded affirmatively and reiterated that she would not sign it. Davalos told three other employees about her encounter with Castillo; they reported that Vasquez had solicited them but they had refused to sign. Pet. App. 4a, 36a-37a, 50a.

b. On or about February 22, Alberto Pacheco, the production manager at Facility A, approached Rosa Rayas in her work area and asked whether she had signed the petition "to get the Union out." When Rayas replied that she had not, Pacheco warned her that, unless she did, the Union would charge her "more than $200" in back dues. Pacheco also told Rayas that the "Union was no good" because "the Union actually was a Mafia." Although Pacheco told Rayas that her signature was

necessary since "they only needed a few more signatures to finish the amount of signatures that the Government requires to get the Union out," she refused to sign the petition. Pet. App. 4a-5a, 39a-40a, 51a.

c. On February 21 or 22, Carlos Sosa observed Saul Monroy, the sanitation manager at Facility A, talking to employees in the dishwashing department about the petition. Monroy then approached Sosa and asked him to sign it so that employees could "obtain better salaries, [a] cheaper health program, and more days' [of paid] vacation." Sosa refused to sign the petition, which he noticed contained about nine signatures. Pet. App. 5a, 40a, 51a.

Between February 22 and 24, Monroy asked Jose Vasquez to "sign the list" in the dishwashing department at Facility A. When Vasquez asked what the list was for, Monroy responded "that he was taking the signatures so that the Union will stay *in*." Vasquez, whom petitioner knew to be a Union supporter, had been forewarned by fellow employees that Monroy would misrepresent the purpose of the list to trick him into signing it. Other employees told Vasquez that Monroy had solicited their signatures, and Vasquez noticed that there were ten to 15 signatures on the list. Vasquez, however, did not sign. Pet. App. 5a, 39a, 50a-51a.

On or about February 26, Monroy asked Alfred Mercado to sign a piece of paper in the dishwashing department at Facility A. Monroy refused to tell Mercado what the piece of paper was for, but Mercado assumed it was a decertification petition. Mercado also saw Monroy approach other employees, but he refused to sign. Pet. App. 5a, 40a, 51a. In late February, Monroy asked Victor Saldana, who worked in the dishroom at Facility A, whether he would "sign to be able to get the Union out." Saldana refused to sign and later told six or

seven co-workers about his encounter with Monroy. *Id.* at 6a, 41a, 51a.

d. Between February 22 and February 25, Monroy solicited groups of employees at Facility A. On February 22, Monroy spoke about the petition with a group of ten employees, three of whom signed it; later that day, Monroy spoke with a group of five employees, one of whom signed. Pet. App. 7a, 38a-39a, 51a. On February 23, Monroy spoke with a group of three or four employees in the cafeteria while holding the petition and offering them his pen. *Id.* at 7a, 37a, 51a. On February 25, Monroy asked a group of ten or 11 employees "to sign the paper to get the Union out," claiming that the Union was "stealing" from employees. The sheet of paper Monroy asked this group of employees to sign was already half filled with signatures. *Id.* at 7a, 41a, 51a.

e. On February 26, Oscar Peralta, the assistant manager at Facility B, handed Israel Lopez "a petition to get the Union out" and asked him to sign it in the presence of seven or eight other employees. Lopez refused to sign the sheet of paper Peralta offered him, which was already about three-fourths filled with signatures, explaining to Peralta that he was a shop steward. Lopez later saw Peralta soliciting Hector Hernandez, who refused to sign. Lopez told as many as 20 employees about his exchange with Peralta. Pet. App. 6a, 38a, 51a.

3. By March 4, 1991, 428 employees (57% of the unit) had signed the decertification petition, which several employees filed that day with the Board. On March 15, the Union requested petitioner to open negotiations for a new contract to succeed the existing agreement, which was due to expire on May 31. On March 20, petitioner informed the Union that it had a "good faith doubt" as to the Union's majority status in the unit, citing the

decertification petition as its basis for that belief, and refused the Union's request for negotiations. Pet. App. 7a, 25a.

To protest petitioner's refusal to bargain, several employees discussed the possibility of calling a strike. Pet. App. 7a. In early April 1991, Jose Ramirez, the general manager of Facility A, summoned Daniel Godoy into his office, accused Godoy of "agitating" the employees to launch a strike and told him that his actions were illegal and could result in his termination. *Id.* at 8a, 52a. On May 22, the employees voted 318 to 6 to go on strike. The 318 votes in favor of a strike represented 42% of the unit. *Id.* at 8a.

Petitioner then issued the following threats to employees: (1) in late May, human resources director Millie Bisono told Jerry Hayes that if he went out on strike, he would be fired; (2) on May 31, labor relations director Roberto Velazquez told Fulgencio Plascencia that petitioner "did not want the Union," that petitioner (in the ALJ's words) "intended to get the Union out any way it could," and that all employees who went out on strike would be "automatically fired"; (3) on June 1, Velazquez told Castulo Flores and a co-worker that striking employees would be "completely fired"; and (4) on June 3, transportation manager Jose Castillo told Willie Land that if she decided to strike she would no longer have a job. Pet. App. 8a, 53a-54a.

The strike commenced on June 3, 1991, and involved 289 employees (39% of the unit), including 61 employees who had signed the decertification petition. Petitioner continued operations by hiring replacement employees, and during the strike granted a wage increase of 4 to 6%. On October 3, the Union ended the strike unconditionally and demanded that petitioner immediately reinstate the strikers. Petitioner, however, refused to

do so, informing the Union that "[n]o current employee will be removed to make room for a striker." Pet. App. 8a-9a, 25a-26a, 49a.

4. On December 20, 1991, the Board's General Counsel issued a complaint against petitioner alleging that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (5), by soliciting employees to sign the decertification petition and withdrawing recognition from the Union based on that petition. The General Counsel also alleged that petitioner violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by refusing to reinstate the strikers at the end of the strike. Pet. App. 9a, 22a-23a.

After a hearing, the administrative law judge (ALJ) concluded that petitioner violated Section 8(a)(1) by circulating and requesting employees to sign the decertification petition, as detailed above. Pet. App. 52a. Crediting the testimony of employees over that of the managers involved (*id.* at 50a-52a), the ALJ found that management's solicitation of employee signatures was "widespread and conspicuous." *Id.* at 55a. Taken in conjunction with Monroy's promise to Sosa of better wages and benefits if the Union were ousted and Pacheco's threat to Rayas respecting liability for back dues if the Union remained the employees' representative, the ALJ concluded that petitioner's acts of solicitation constituted unlawful conduct "of such a character as to cause employee disaffection, [having] an inherent tendency to contribute to the Union's loss of majority status." *Ibid.* "Solicitation under such circumstances," the ALJ explained, "interferes with employee freedom of choice, as the signatures obtained on the petition may not necessarily reflect the true desires of the employees and may therefore not be relied upon by

[petitioner] as a basis for withdrawing recognition." *Ibid.*

In so holding, the ALJ rejected petitioner's contention that its solicitation of employees was isolated and numerically insignificant in relation to the size of the unit. Pet. App. 55a. The ALJ explained that petitioner's managers solicited numerous employees in the presence of other employees; that "the employees who were approached related this fact to their co-workers"; and that, although some employees declined to sign the petition proffered by the managers, the petition sheets circulated by them showed that other employees had been constrained to sign. *Ibid.* The ALJ added that, given the "widespread and conspicuous" nature of the managers' solicitation efforts, and their accompanying threats and promises, it was reasonable to assume that those employees who signed the petition at the behest of their co-workers were aware of, and likely unfairly influenced by, the managers' unlawful conduct. *Ibid.*

Accordingly, the ALJ concluded that petitioner violated Section 8(a)(5) by relying on the "tainted" decertification petition as the basis for withdrawing recognition from the Union, and by granting the wage increase during the strike without bargaining with the Union. Pet. App. 55a-56a. The ALJ also concluded that the statements made by Monroy and Pacheco to Sosa and Rayas in connection with the solicitation of their signatures, and management's threats to fire employees who encouraged or participated in the strike, constituted independent violations of Section 8(a)(1). Pet. App. 52a-54a. And, because the strike had been called "in large part[] in protest of [petitioner's having] express[ed] a good faith doubt of the Union's majority status, and refusal to bargain for a new agreement," the ALJ found that petitioner violated Section 8(a)(3) by refusing to

reinstate the strikers to their former jobs at the conclusion of the strike. Pet. App. 56a-57a.

To remedy its unfair labor practices, the ALJ ordered petitioner, among other things, to cease and desist from refusing to bargain with the Union and to reinstate the strikers with backpay. In addition, the ALJ ordered petitioner to bargain upon request with the Union. Pet. App. 59a.

The Board affirmed the ALJ's findings and conclusions, and, with a minor modification not relevant here, adopted his remedial order. Pet. App. 19a-20a.[2]

5. The court of appeals enforced the Board's order in part. Pet. App. 1a-18a. The court, in agreement with the Board, found that substantial evidence made the conclusion "virtually inescapable" that "[petitioner's] management solicited a considerable number of signatures." *Id.* at 12a-13a. The court noted, in particular, that 61 employees who signed the decertification petition participated in the strike, and, were their signatures discounted, the petition would not have been supported by a majority of the employees. *Id.* at 14a. The court also agreed with the Board that "employees who signed the petition at the behest of other employees were undoubtedly aware of management's obvious efforts to engineer the decertification." *Id.* at 13a. In short, the court found "no cause to quibble with the ALJ's conclusion, adopted by the Board, that signing employees

---

[2] Petitioner did not challenge, either before the Board or in the court of appeals, the ALJ's determination that petitioner violated Section 8(a)(1) by threatening to discharge employees who encouraged or participated in the strike. Petitioner does not contest that finding here. Further, petitioner did not challenge in the court of appeals, and does not contest here, the ALJ's conclusion that Monroy's and Pacheco's remarks to solicitees Sosa and Rayas violated Section 8(a)(1).

were influenced by pervasive management efforts to procure signatures." *Ibid.* The court upheld the Board's remedial order, except for the affirmative requirement that petitioner bargain with the Union. Because that provision would bar the employees from decertifying the Union for a reasonable period of time, the court remanded the case to the Board for "[an] explanation as to why, in the particular circumstances, the extra protection against decertification was necessary." *Id.* at 17a-18a.

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the National Labor Relations Board's decisions have rendered "illusory" in practice the "good faith doubt" defense accorded an employer who withdraws recognition from an incumbent union believing the union to lack majority status. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (after certification year, employer may withdraw recognition from incumbent union "either by showing that the union in fact lacks majority support or by demonstrating a sufficient objective basis for doubting the union's majority status"). That issue is simply not presented by the instant case. It was not raised in, or addressed by, the court of appeals. Rather, in the court of appeals, petitioner argued unsuccessfully that there was not substantial evidence that its conduct had tainted the union decertification petition. Pet. C.A. Br. 18-23. Petitioner presents no basis for deviating from this Court's "normal policy" of not considering issues presented in the first instance to this Court. *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 330 (1967).

In any event, the issue framed by petitioner is not presented by the facts of this case. Petitioner condemns

(Pet. 7) the Board for "regularly reject[ing] circumstantial evidence of the union's lack of employee support as insufficient," and instead requiring the employer to prove that the union has in fact lost majority status.[3] Petitioner claims (Pet. 7-8) that that burden is unattainable in practice because it can only be achieved by polling the employees, which employers are effectively prevented from doing absent a good faith doubt as to the union's majority status. See *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1059 (1989) (employer must have a reasonable doubt as to the incumbent union's continued majority status in order to poll employees, petition the Board for an election, or withdraw recognition from the union), modified on other grounds, 923 F.2d 398 (5th Cir. 1991).[4] But this case does not involve an employer prevented by the *Texas Petrochemicals* rule from polling employees to confirm other evidence indicating that the union no longer enjoys majority support, or a rejection by the Board of untainted circumstantial evidence of a union's loss of support.

---

[3] See *Curtin Matheson*, 494 U.S. at 788 n.8 ("To show a good-faith doubt, an employer may rely on circumstantial evidence; to show an actual lack of majority support, however, the employer must make a numerical showing that a majority of employees in fact oppose the union.").

[4] In thus framing the question presented, petitioner echoes the concerns raised by the Chief Justice and Justice Blackmun in their separate opinions in *Curtin Matheson*. See 494 U.S. at 797 (Rehnquist, C.J., concurring) (questioning "whether the Board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments"); *id.* at 799 n.3 (dissenting opinion of Blackmun, J.).

On the contrary, the evidence credited by the Board and the court of appeals was that petitioner knew in February 1991 that 403 employees (a 54% *majority* of the bargaining unit) had authorized it to deduct Union dues and fees from their paychecks. Pet. App. 3a, 30a. Notwithstanding its knowledge of the union's majority support, petitioner less than a month later launched a "widespread and conspicuous" (*id.* at 55a) campaign to induce employees to sign a decertification petition that had been sponsored by approximately 13 employees (less than 2% of the bargaining unit). As the Board found, petitioner then relied upon the tainted petition to justify withdrawing recognition from their bargaining representative. Far from petitioner's having a legitimate circumstantial basis for doubting the Union's majority support, the actions of petitioner's employees demonstrated the contrary. Notwithstanding petitioner's threats to discharge employees if they protested its action by striking, 61 of the employees who originally signed the petition participated in the ensuing strike—a number that, if subtracted from the total number of signatories on the tainted decertification petition, deprived that petition of the signatures of a majority of employees. *Id.* at 4a-8a, 14a, 50a-54a. Under these circumstances, as the Board and the court of appeals found, petitioner's conduct, far from representing good faith reliance on circumstantial proof of employee disaffection with their union, was a blatant violation of Section 8(a)(5) of the Act under established precedent.[5]

---

[5] "[A]n employer that has itself orchestrated the union-ousting campaign" by promoting a decertification petition "cannot rely on the pendency of [that] petition or the [union's] loss of majority status to justify its withdrawal of recognition of, and refusal to bargain with the incumbent representative." *NLRB* v. *Maywood*

2. Petitioner also contends (Pet. 8-9) that the Board fails to follow a neutral policy respecting the holding of elections. Petitioner asserts that it is wrong for the Board not to conduct a decertification election where the decertification petition has been unlawfully solicited by the employer, but to conduct a representation election where the union has violated the parallel rule of *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270, 277 (1973) (union's offer to waive initiation fees for those employees who signed a pre-election "recognition slip" interferes with employee free choice in the election). This claim was also neither raised below nor addressed by the court of appeals.

Petitioner's criticism is also mistaken. In *Gaylord Bag Co.*, 313 N.L.R.B. 306 (1993), the Board found that some of the union authorization cards submitted to satisfy the showing of interest requirement for obtaining a Board election[6] had been secured through a fee waiver offer in violation of *Savair*. The Board held that this violation justified setting aside the election (which the union had won). At the same time, the Board rejected the employer's claim that the *Savair* violation also required the more severe sanction that the representation petition be dismissed. Instead, it directed that a new election be held. Petitioner contends (Pet. 9)

Plant of Grede Plastics, 628 F.2d 1, 5 (D.C. Cir. 1980). Accord *Microimage Display Div. of Xidex Corp.* v. *NLRB*, 924 F.2d 245, 253-254 (D.C. Cir. 1991); *NLRB* v. *Sky Wolf Sales*, 470 F.2d 827, 830 (9th Cir. 1972).

[6] Before proceeding to an election on a union petition, the Board requires a showing that "the petitioner has been designated by at least 30 percent of the employees." 29 C.F.R. 101.18(a). The purpose of a showing of interest is to determine whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election. See *NLRB* v. *J.I. Case Co.*, 201 F.2d 597 (9th Cir. 1953).

that because the union violations in *Gaylord* did not merit the penalty of dismissal of the petition, its unlawful solicitation should not "result in dismissal of the decertification petition, thereby depriving employees of even one opportunity to vote a union *out*."

Petitioner's analogy fails, for two reasons. First, in *Gaylord*, the Board found sufficient employee interest in union representation to warrant a new election notwithstanding the union's misconduct, see 313 N.L.R.B. at 307, whereas here, the evidence found by the Board belies the claim that sufficient untainted employee disaffection with the Union existed to justify the conduct of a decertification election. Second, the issue before the Board in this case was not, as in *Gaylord*, the purely administrative one of whether to conduct an election or to dismiss the petition. Here, the employer not only tainted the petition, but made impossible the holding of a fair election by unlawfully withdrawing recognition from and refusing to bargain with the Union. Such misconduct must be remedied before a fair election can be held, typically through the issuance of an order requiring the employer to cease and desist from refusing to bargain with the union and to post a notice agreeing to that condition, and a separate order requiring the employer to bargain, upon request, with the union.[7] The

---

[7] See, *e.g.*, *Ron Tirapelli Ford, Inc.* v. *NLRB*, 987 F.2d 433, 445 (7th Cir. 1993); *NLRB* v. *Hollaender Mfg. Co.*, 942 F.2d 321, 327-328 (6th Cir. 1991), cert. denied, 112 S. Ct. 1168 (1992); *Louisiana-Pacific Corp.* v. *NLRB*, 858 F.2d 576, 578-579 (9th Cir. 1988); *Alexander Linn Hospital Ass'n*, 288 N.L.R.B. 103, 111 (1988), enforced *sub nom. NLRB* v. *Wallkill Valley General Hosp.*, 866 F.2d 632, 636-638 & n.3 (3d Cir. 1989); *NLRB* v. *A.W. Thompson, Inc.*, 449 F.2d 1333, 1336-1337 (5th Cir. 1971), cert. denied, 405 U.S. 1065 (1972). See also *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512 (1942); *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704-705 (1944).

Board in this case issued both such orders. But, with the court of appeals having remanded the latter order for further explanation, petitioner in fact has thus far fared better in the court of appeals below than it might have in other circuits.

3. Petitioner's final claim (Pet. 10-14) is that the court of appeals erred in holding that substantial evidence supported the Board's finding that it engaged in widespread unlawful solicitation of the decertification petition. That fact-bound claim does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, the Board's finding, affirmed by the court of appeals, was amply supported by evidence (1) that petitioner's managers solicited numerous employees on an individual basis, often in the presence of other employees; (2) that employees so solicited told co-workers about their confrontations with management; (3) that manager Monroy solicited entire groups of employees, some of whom signed the petition; (4) that employee signatures in fact appeared on the petitions which the managers circulated; and (5) that employees who signed the petition at the behest of co-workers were undoubtedly aware of, and were likely influenced by, the managers' solicitation efforts. In these circumstances, the court of appeals correctly found "virtually inescapable" the conclusion that "[petitioner's] management solicited a considerable number of signatures." Pet. App. 12a-13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

OCTOBER 1994

(3)

FILED
NOV 15 1994
OFFICE OF THE CLERK

No. 94-400

In the Supreme Court of the United States

OCTOBER TERM, 1994

CATERAIR INTERNATIONAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR CATERAIR INTERNATIONAL

GARY L. THEURER
6550 Rock Spring Drive
Bethesda, Maryland 20817
(301) 897-7864
Counsel of Record

IVAN H. RICH, JR.
RICH & D'AMBROSIO, P.S.C.
513 South Fifth Street
Louisville, Kentucky 40202
(502) 585-6328
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

8 pp

TABLE OF AUTHORITIES

PAGE

Cases:

Johns-Manville Sales Corp. v. *NLRB*, 289 NLRB 358 (1988), *enf. den.* 906 F.2d 1428 (10th Cir. 1990) 1

NLRB v. *Curtin Matheson Scientific*, 494 U.S. 775 (1990) 1–2

NLRB v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973) 2

T.L.C. of St. Petersburg, 307 NLRB 605 (1992) 4

Periodicals:

Bureau of National Affairs, Analysis/News and Background Information, 147 LRR 18 (Sept. 5, 1994) 5

Comment, *Confusion Surrounding the Good Faith Doubt Evidentiary Standard Goes Unchecked*, 6 J. L. COMMENTARY 93 (1990) 2

Comment, *The Effect of a Nonpresumption as to Striker Replacements' Union Sentiments on the Good-Faith Doubt Defense*, 52 OHIO STATE L. J. 919 (1991) 2

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-400

CATERAIR INTERNATIONAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

REPLY BRIEF FOR CATERAIR INTERNATIONAL

ARGUMENT

This Court has never considered the Labor Board's "good-faith doubt" rule in cases of employer withdrawal of recognition from a union. Caterair's petition contends the Board's administration of this standard is biased and unrealistic. Pet. 7.

There can be no real dispute that the Board rejects any circumstantial evidence of "good-faith doubt" and requires a numerical majority composed of "individual employees [having] expressed desires to repudiate the union." *Johns-Manville Sales Corp.* v. *NLRB*, 906 F.2d 1428, 1432 (10th Cir. 1990), *quoting* Chief Justice Rehnquist in *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 798-799

(1990).[1] The actual Board practice of requiring a petition signed by a majority of employees "leaves little if anything of the good-faith doubt rule and effectively collapses it into the proof in fact rule." *Id.* 906 F.2d at 1433.

Although the Board requires the petition to be "presented" to the employer, any proof of employer involvement in the actual solicitation of signatures will be inferred to have fatally "tainted" the petition. This case illustrates the essentially conclusive nature of the Board's inference; there was no direct proof that even one of the 428 signatures was solicited by management.[2] Pet. 8. However, the Board treats cases of coercive union solicitation differently by not inferring "taint" of any unlawfully solicited cards other than those actually signed and never dismisses the union's petition. This disparate treatment exists notwithstanding this Court's requiring the Board's election rules to be "wholly neutral." *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270, 278 (1973).

The Board did not respond to Caterair's challenge to cite a single case where there was *any* supervisory solicitation when the employees were *ever* allowed to vote on whether to retain the union. Instead, its brief in opposition goes to some length to rehash the eight singular in-

---

[1]See also, Comment, *The Effect of a Nonpresumption as to Striker Replacements' Union Sentiments on the Good-Faith Doubt Defense,* 52 OHIO STATE L. J. 919, 941-3 (1991); Comment, *Confusion Surrounding the Good Faith Doubt Evidentiary Standard Goes Unchecked,* 6 J. L. COMMENTARY 93, 112 (1990).

[2]Even the Board's statement of the question presented in its opposing brief concedes it will find a withdrawal of recognition unlawful when a company has "actively solicited" for a decertification election among employees. Since there can be no such thing as "passive" solicitation the Board apparently means any solicitation by management is enough to trigger the inference.

stances of solicitation necessarily conceded by Caterair under the substantial evidence rule, (Br. 3-7) and suggests these instances alone support the inference the solicitation "launched" and "orchestrated" by Caterair was "wide-spread and conspicuous." Br. 12. Rhetoric is not, however, a substitute for evidence and analysis. It remains undisputed: not one of the 428 employees who signed the petition claimed any management solicitation and neither the Board nor Court of Appeals found the eight instances of solicitation, standing alone, sufficient to taint the petition.

The Board asserts "the facts of this case" do not present a good-faith doubt issue. It misstates Caterair's argument to be that the proof in fact standard can "be achieved only by polling the employees." Br. 11. Then the Board concludes this case does not involve either an employer poll or "untainted circumstantial evidence of a union's loss of support."[3] Br. 12.

These arguments are simply unresponsive to Caterair's petition. Obviously, Caterair did not conduct a poll because it clearly would have been rejected under the Board's rules. As required by the Board's actual practice, Caterair relied on a decertification petition to show numerical proof, not "circumstantial evidence", the union had lost majority support.

The Board's brief in opposition does not really deny Caterair's argument that the good-faith doubt rule has been

---

[3]The Board's contention (Br. 10, 13) that Caterair did not argue these issues before the Court of Appeals is simply incorrect. The company argued vigorously and at length that its conduct could not possibly have tainted the decertification petition. Although Caterair framed the issue before the Court of Appeals in traditional terms of "substantial evidence", this surely cannot prevent it from emphasizing broader policy issues before this Court.

effectively collapsed into the proof in fact standard. The Board tacitly accepts the point by resorting to numbers supposedly showing the union had majority support. Br. 12. Although the Board's argument concedes the analytical point, it does not prove union majority support. That 54% of the employees were having dues deducted from their paychecks at the time of the decertification petition proves nothing in light of the collective bargaining agreement's requiring employees to join the union and pay dues or be fired. J.A. 67. The salient point is 46% of the employees risked discharge by not having dues deducted.[4] Similarly, the fact that 61 employees, out of the 428 who signed the petition in February, supported the strike in June proves nothing when not a single one claimed to have been improperly solicited. If there was any significant management involvement in the decertification effort then some of those 61 would surely have provided some evidence to that effect.

The Board's reliance on numbers that are, at most, weak indicators of union support, proves only that the dispute should have been resolved definitively by an election. Had the employees been allowed to vote in 1991, even allowing for an appropriate notice posting period to remedy what truly was minor employer misconduct, the ensuing strike and lengthy litigation would have been avoided. In the time it has taken to litigate this case, three elections could have been conducted. By uniformly denying employees the right to vote, even in cases of minor em-

---

[4]There is no evidence the union was collecting dues by any means other than check-off. It is also noteworthy that the Board holds the refusal of a majority of employees to authorize check-off is not probative evidence of a *lack* of majority support for a union. See, e.g., *T.L.C. of St. Petersburg*, 307 NLRB 605 (1992).

ployer misconduct, the Board effectively imposes unwanted unions on employees.[5]

The Board's effort to distinguish its clearly disparate treatment of unlawful union solicitation underscores the frailty of its position. It asserts that in a case of coercive union solicitation there is "sufficient employee interest" to conduct an election but an employer violation precludes "sufficient untainted employee disaffection" to allow a vote. Br. 14. This is precisely Caterair's point: the Board *always* conducts another certification election, irrespective of a union's misconduct, but *never* allows a decertification vote in cases of minor employer misconduct.

The Board further argues that cases of unlawful union solicitation present a "purely administrative" issue but an employer withdrawal of recognition requires imposition of a bargaining order remedy. Br. 14-15. Again, this is precisely Caterair's point: under the guise of its remedial discretion the Board deprives employees of any opportunity to vote a union out while conducting multiple elections in cases of union misconduct.

Finally, the Board's brief chides Caterair for presenting a "fact bound" argument that substantial evidence does not support the Board's finding of unlawful management solicitation. Br. 15. Actually, Caterair made the somewhat different argument that the undisputed evidence squarely refutes the findings underlying the crucial infer-

---

[5]The current Board Chair apparently wants to abandon the majority status concept in all cases. He reportedly advocates imposing a bargaining obligation on an employer whenever "a substantial number of employees, such as 20 percent or 30 percent" indicates a desire for union representation. Remarks of Chair William B. Gould before the Washington State Labor Council, August 22, 1994, reported in BNA, Analysis/News and Background Information, 147 LRR 18 (Sept. 5, 1994).

ence of management solicitation influencing a significant number of signatures.

There was no legitimate basis for a rational decision maker to conclude Caterair's conduct was sufficient to require dismissal of the decertification petition in this case. The Board should not be allowed to stretch its rule preventing an employer from destroying a union's support into a conclusive inference that any employer solicitation must result in the dismissal of a decertification petition.

Respectfully submitted,

GARY L. THEURER
6550 Rock Spring Drive
Bethesda, Maryland 20817
(301) 897-7864
Counsel of Record

IVAN H. RICH
RICH & D'AMBROSIO, P.S.C.
513 South Fifth Street
Louisville, Kentucky 40202
(502) 585-6328
Counsel for Petitioner

November 14, 1994